DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-609
Title: Kansas, Petitioner
v.
Scott D. Cheever
Docketed: November 15, 2012
Lower Ct: Supreme Court of Kansas
Case Nos.: (99,988)
Decision Date: September 10, 2012

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Nov 13 2012	Petition for a writ of certiorari filed. (Response due December 17, 2012)
Dec 4 2012	Order extending time to file response to petition to and including January 16, 2013.
Jan 11 2013	Brief of respondent Scott D. Cheever in opposition filed.
Jan 11 2013	Motion for leave to proceed in forma pauperis filed by respondent Scott D. Cheever.
Jan 23 2013	DISTRIBUTED for Conference of February 15, 2013.
Jan 23 2013	Reply of petitioner Kansas filed. (Distributed)
Feb 19 2013	DISTRIBUTED for Conference of February 22, 2013.
Feb 25 2013	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Feb 25 2013	Petition GRANTED limited to Question 1 presented by the petition.
Mar 25 2013	The time to file the joint appendix and petitioner's brief on the merits is extended to and including May 13, 2013.
Mar 25 2013	The time to file respondent's brief on the merits is extended to and including July 22, 2013.
Apr 2 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Apr 3 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent.
May 13 2013	Joint appendix filed. (Statement of costs filed.)
May 13 2013	Brief of petitioner Kansas filed.
May 17 2013	Brief amici curiae of National District Attorneys Association, et al. filed.
May 20 2013	Brief amicus curiae of the United States filed.
May 20 2013	Brief amici curiae of California, et al. filed.
May 20 2013	Brief amicus curiae of Criminal Justice Legal Foundation filed.
May 23 2013	Motion of the Solicitor General for leave to participate in oral argument as

	amicus curiae and for divided argument filed.
Jul 22 2013	CIRCULATED.
Jul 22 2013	Brief of respondent Scott D. Cheever filed. (Distributed)
Jul 23 2013	SET FOR ARGUMENT on Wednesday, October 16, 2013.
Jul 29 2013	Brief amicus curiae of Judge David L. Bazelon Center for Mental Health Law filed. (Distributed)
Jul 29 2013	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. (Distributed)
Jul 29 2013	Brief amicus curiae of American Civil Liberties Union, et al. filed. (Distributed)
Aug 21 2013	Reply of petitioner Kansas filed. (Distributed)
Aug 22 2013	Record received from District Court of Supreme Court of Kansas - 3 boxes.
Aug 30 2013	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 16 2013	Argued. For petitioner: Derek Schmidt, Attorney General, Topeka, Kan.; and Nicole A. Saharsky, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondent: Neal Katyal, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED
NOV 13 2012
OFFICE OF THE CLERK

No. 12-609

In the Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

SCOTT D. CHEEVER,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Kansas

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. When a criminal defendant affirmatively introduces expert testimony that he lacked the requisite mental state to commit capital murder of a law enforcement officer due to the alleged temporary and long-term effects of the defendant's methamphetamine use, does the State violate the defendant's Fifth Amendment privilege against self-incrimination by rebutting the defendant's mental state defense with evidence from a court-ordered mental evaluation of the defendant?

2. When a criminal defendant testifies in his own defense, does the State violate the Fifth Amendment by impeaching such testimony with evidence from a court-ordered mental evaluation of the defendant?

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General of the State of Kansas respectfully petitions for a Writ of Certiorari to review the judgment of the Kansas Supreme Court.

OPINION BELOW

The opinion of the Kansas Supreme Court is reported at *State v. Cheever*, 284 P.3d 1007 (Kan. 2012), and is reproduced as Appendix A to this petition. App. 1-68.

JURISDICTION

The Kansas Supreme Court decided this case August 24, 2012. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, "No person . . . shall be compelled in any criminal case to be a witness against himself . . ." U.S. Const. amend. V.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, ". . . nor shall any State deprive any person of life, liberty, or property without due process of law . . ." U.S. Const. amend. XIV.

Kan. Stat. Ann. § 22-3219 states, in pertinent part:

> (1) Evidence of mental disease or defect excluding criminal responsibility is not admissible upon a trial unless the defendant serves upon the prosecuting attorney and files with the court a written notice of such defendant's intention to assert the defense that the defendant, as a result of mental disease or defect lacked the mental state required as an element of the offense charged.
>
> (2) A defendant who files a notice of intention to assert the defense that the defendant, as a result of mental disease or defect lacked the mental state required as an element of the offense charged thereby submits and consents to abide by such further orders as the court may make requiring the mental examination of the defendant and designating the place of examination and the physician or licensed psychologist by whom such examination shall be made. . . . A report of each mental examination of the defendant shall be filed in the court and copies thereof shall be supplied to the defendant and the prosecuting attorney.

Kan. Stat. Ann. § 21-5209 (formerly § 22-3220) states:

> It shall be a defense to a prosecution under any statute that the defendant, as a result of mental disease or defect, lacked the culpable mental state required as an element of the crime

charged. Mental disease or defect is not otherwise a defense.

Kan. Stat. Ann. § 21-5205 (formerly § 21-3208) states:

> **(a)** The fact that a person charged with a crime was in an intoxicated condition at the time the alleged crime was committed is a defense only if such condition was involuntarily produced and rendered such person substantially incapable of knowing or understanding the wrongfulness of such person's conduct and of conforming such person's conduct to the requirements of law.
>
> **(b)** An act committed while in a state of voluntary intoxication is not less criminal by reason thereof, but when a particular intent or other state of mind is a necessary element to constitute a particular crime, the fact of intoxication may be taken into consideration in determining such intent or state of mind.

Federal Rule of Criminal Procedure 12.2 provides, in pertinent part:

> **(b) Notice of Expert Evidence of a Mental Condition.** If a defendant intends to introduce expert evidence relating to a mental disease or defect or any other mental condition of the defendant bearing on either (1) the issue of guilt or (2) the issue of punishment in a capital case, the defendant must--within the time provided for filing a pretrial motion or at any later time the court sets--notify an attorney for the

government in writing of this intention and file a copy of the notice with the clerk. The court may, for good cause, allow the defendant to file the notice late, grant the parties additional trial-preparation time, or make other appropriate orders.

(c) Mental Examination.

(1) Authority to Order an Examination; Procedures.

(A) The court may order the defendant to submit to a competency examination under 18 U.S.C. § 4241.

(B) . . . If the defendant provides notice under Rule 12.2(b) the court may, upon the government's motion, order the defendant to be examined under procedures ordered by the court.

(4) Inadmissibility of a Defendant's Statements. No statement made by a defendant in the course of any examination conducted under this rule (whether conducted with or without the defendant's consent), no testimony by the expert based on the statement, and no other fruits of the statement may be admitted into evidence against the defendant in any criminal proceeding except on an issue regarding mental condition on which the defendant:

> **(A)** has introduced evidence of incompetency or evidence requiring notice under Rule 12.2(a) or (b)(1), or . . .

STATEMENT OF THE CASE

On January 19, 2005, Greenwood County Sheriff Matt Samuels, accompanied by two deputies, went to the Cooper home in a rural part of Greenwood County, Kansas, known as "Hilltop" (and known for illegal drug activity) to execute a warrant for Scott Cheever's arrest. Cheever was in fact at the Cooper home that day. At some point prior to or during the arrival of the law enforcement officers, Cheever apparently realized that they were coming for him, and so he hid in an upstairs room, armed with a pair of handguns.

When Sheriff Samuels arrived at the Cooper house, Darrell Cooper lied and told the Sheriff that Cheever was not there. The Sheriff asked if he could look around the house anyway. Cooper consented, and the Sheriff entered the house. As Sheriff Samuels started up the stairs, Cheever ambushed him with a .44 caliber revolver, shooting the Sheriff twice in the chest at close range.

Sheriff Samuels lay mortally wounded at the foot of the stairs when Deputy Sheriff Michael Mullins attempted to provide first-aid, but Cheever shot at Deputy Mullins as well. Cheever abated fire only after Mullins yelled at Cheever to stop so that the deputies could get the Sheriff out of the house. Mullins started CPR on the Sheriff while another deputy, Tom Harm, radioed for help. Sheriff Samuels was taken to a hospital but his wounds were fatal.

After the shooting, State and local law enforcement officers surrounded the Cooper house. After roughly seven hours, a Kansas Highway Patrol (KHP) special response team entered the house and rushed the stairs through a hail of gunfire from Cheever. Only when the response team cleared the top of the stairs and began returning fire did Cheever stop shooting and surrender.

Cheever was charged in state court with capital murder for the killing of Sheriff Samuels, with attempted capital murder for shooting at Deputies Mullins and Harm, and with attempted capital murder for shooting at two of the KHP response team officers who took him into custody. Cheever also was charged with manufacturing methamphetamine, conspiracy to manufacture methamphetamine, and criminal possession of a firearm.

However, because the Kansas Supreme Court recently had held Kansas' death penalty statute unconstitutional, *see State v. Marsh*, 278 Kan. 520, 102 P.3d 445 (2004), *reversed*, *Kansas v. Marsh*, 548 U.S. 163 (2006), and that decision was still under review by this Court, the State asked federal authorities to prosecute Cheever under the Federal Death Penalty Act. Cheever then was indicted on thirteen federal counts, including capital murder. USDC Case No. 05-10050-01-MLB; *See also United States v. Cheever*, 423 F. Supp. 2d 1181 (D.Kan. 2006).

In the federal case, Cheever filed notice, pursuant to Federal Rule of Criminal Procedure (FRCP) 12.2(b), that he intended "to introduce expert evidence relating to his intoxication by methamphetamine at the time of the events on January 19, 2005, which negated his

ability to form specific intent, *e.g.*, malice aforethought, premeditation and deliberation." (USDC Case No. 05-10050-01-MLB, Doc. 205). App. 69-71. Pursuant to FRCP 12.2(c), the district court ordered a psychiatric evaluation of Cheever by Dr. Michael Welner, a forensic psychiatrist and clinical pyschopharmacologist, to assess (1) "the relationship of methamphetamine and [Cheever's] use of it on January 19th, 2005, to his killing Matthew Samuels," (2) the effects of Cheever's ongoing methamphetamine use, and (3) "to what degree that ongoing use over all of that time related to his behaviors in killing Matthew Samuels." App. 72-73.

In September, 2006, Cheever's case proceeded to jury trial in federal court. However, several days into the trial, a mistrial was declared after Cheever's defense counsel became unable to proceed. In the meantime, this Court reversed the Kansas Supreme Court in *Kansas v. Marsh* and held that the Kansas death penalty statute is constitutional. The federal case was then dismissed without prejudice, and Kansas recommenced the state prosecution.

At trial, the State presented the testimony of the various law enforcement officers involved in the events of January 19, 2005. Cheever himself testified in his own defense and admitted that he shot and killed Sheriff Samuels, that he shot at Deputies Mullins and Harm, and that he shot at two KHP Troopers when they entered the house. Cheever also admitted to manufacturing methamphetamine, that he previously had pled guilty to robbing a grocery store and assaulting a clerk, and that at the time he shot Sheriff

Samuels he (Cheever) was a felon in unlawful possession of a firearm (multiple firearms actually).

Cheever's defense was "voluntary intoxication" – that because of his use of methamphetamines he lacked the mental ability to "premeditate" the murderous crimes he committed on January 19, 2005. Relying on both his own testimony and the expert testimony of Dr. R. Lee Evans, a psychiatric pharmacist, Cheever argued that methamphetamine use made him incapable of forming the necessary intent (premeditation) for the capital charges.

Dr. Evans described the effects of methamphetamine on the brain. He testified that, over time, such drug abuse inhibits brain functions, including decision-making, and it causes side effects such as paranoia and violence. Dr. Evans further testified that, on the day of the murder, Cheever was under the intoxicating effects of methamphetamine and was incapable of rational thought. He testified that Cheever's shooting of Sheriff Samuels was a drug-induced reaction to a perceived threat, and not the result of any thought process. Dr. Evans stated that it was his expert opinion that Cheever's use of methamphetamine affected Cheever's ability to premeditate the capital crimes. App. 75-84.

In rebuttal, the State called Dr. Welner, the psychiatrist who evaluated Cheever in the federal case after Cheever filed a notice of his intent to rely on the same defense in that proceeding. Dr. Welner testified that no information he received or reviewed "demonstrated a change in [Cheever's] behavior" from the time that he [Cheever] went to the Cooper

residence, before he used methamphetamine, or to the time after he injected himself the morning of the murder. Dr. Welner further testified, "there were not signs from the history of a remarkable change in [Cheever] after he used the methamphetamine that morning." App. 85-87.

Dr. Welner also explained that Cheever's perceptions and awareness of his surroundings on January 19, 2005, were unimpaired, pointing out that Cheever engaged in a series of decisions once the police arrived, decisions that demonstrated functioning thought processes and an ability to control his actions. Dr. Welner ultimately testified that, in his professional opinion, on the morning of the murder Cheever retained the ability to think before acting, and Cheever was able to form the premeditated intent to kill. App. 91-95.

The jury found Cheever guilty on all counts, and Cheever was sentenced to death for capital murder. On direct appeal, the Kansas Supreme Court reversed the capital murder and attempted capital murder convictions and the death sentence, holding that the admission of Dr. Welner's rebuttal testimony violated Cheever's Fifth Amendment privilege against self-incrimination. The court observed that "Cheever relies primarily on *Estelle v. Smith*, 451 U.S. 454 (1981), *Buchanan v. Kentucky*, 483 U.S. 402 (1987), and several related cases to argue that because he had not waived the privilege by presenting evidence of a mental disease or defect at trial, the State was precluded by the Fifth Amendment from using statements he made during Welner's examination, conducted as part of the federal case, against him." App. 22.

The court determined that, under Kansas law, Cheever's defense of "voluntary intoxication" was not the same or the equivalent of a claim of "mental disease or defect" as defined by Kansas statutes. As a result, the court opined that Cheever's intoxication defense would not—under Kansas law—have justified a court-ordered mental examination. Thus, the Fifth Amendment was violated because Cheever's assertion of a "voluntary intoxication" defense did not waive his Fifth Amendment privilege or open the door to the use of Dr. Welner's testimony as rebuttal. App. 30-35.

Instead,

> we find that Cheever's evidence showed only that he suffered from a temporary mental incapacity due to voluntary intoxication; it was not evidence of a mental disease or defect within the meaning of K.S.A. 22-3220. Consequently, Cheever did not waive his Fifth Amendment privilege and thus permit his court-ordered examination by Dr. Welner to be used against him at trial.

App. 34-35.

The court further discussed whether it was error to allow the State to introduce evidence from the federal, court-ordered mental examination to *impeach Cheever's own testimony*. The court opined that there is a split of authority on this question in the Circuits. App. 35-38 (citing *United States v. Leonard*, 609 F.2d 1163, 1165-67 (5th Cir. 1980) (statements admissible solely on the issue of sanity) and *United States v. Castenada*, 555 F.2d 605, 609 (7th Cir. 1977) (statements admissible

for impeachment of defendant's own testimony)). The court then went on to reject the State's argument that such evidence is admissible for impeachment purposes under cases such as *Harris v. New York*, 401 U.S. 222 (1971), and *Kansas v. Ventris*, 556 U.S. 586 (2009), although the court opined that it need not conclusively decide the impeachment issue because the court already had determined that the admission of Dr. Welner's testimony as rebuttal of Cheever's expert was reversible constitutional error. App. 37-38.

REASONS FOR GRANTING THE WRIT

The Kansas Supreme Court's holding that the Fifth Amendment is violated when the State presents rebuttal evidence from a court-ordered mental examination of the defendant *after* the defendant first affirmatively introduces expert evidence that he lacked the mental state to commit capital murder warrants this Court's review for several reasons:

1. The Kansas Supreme Court's decision conflicts with this Court's decision in *Buchanan v. Kentucky*, 483 U.S. 402 (1987), as well as the Fourth Circuit's decision in *United States v. Curtis*, 328 F.3d 141 (4th Cir. 2003), the Fifth Circuit's decision in *Schneider v. Lynaugh*, 835 F.2d 570 (5th Cir. 1988), the Ninth Circuit's decision in *United States v. Halbert*, 712 F.2d 388 (9th Cir. 1983), and the majority of decisions from other lower courts on this issue. By its decision, the Kansas Supreme Court takes the side of a minority of courts that have found a Fifth Amendment violation. This clear split of authority on an important and recurring constitutional question warrants an exercise of this Court's plenary review.

2. The Kansas Supreme Court incorrectly determined the scope of Cheever's Fifth Amendment right—a federal question, not a question of state law, *Brookhart v. Janis*, 384 U.S. 1, 4 (1966)—by reliance on state statutory definitions of mental disease/defect and voluntary intoxication defenses, rather than the fact that Cheever affirmatively and deliberately made his mental state an issue through his own and his expert's testimony about the alleged effects of Cheever's methamphetamine usage. The Kansas Supreme Court's purported Fifth Amendment distinction between mental disease/defect on the one hand, and voluntary intoxication on the other, is based *solely on Kansas law*, not the Fifth Amendment or this Court's cases, nor is the distinction substantively meaningful or correct.

In essence, the Kansas Supreme Court allowed Cheever to present an allegedly scientific, mental-state defense through his own and expert testimony while at the same time shielding himself from effective rebuttal evidence. The court reached that erroneous result by labeling Cheever's denial that he had the requisite mental state as "voluntary intoxication" rather than "mental disease or defect," undermining fundamental fairness in the adjudicative process and creating a nonsensical anomaly.

This Court long has recognized that "it may be unfair to the state to permit a defendant to use psychiatric testimony without allowing the state a means to rebut that testimony," *Powell v. Texas*, 492 U.S. 680, 685 (1989) (*per curiam*), which is precisely what happened in this case. Furthermore, under cases such as *Harris v. New York*, 401 U.S. 222 (1971), and

Kansas v. Ventris, 556 U.S. 586 (2009), the State is allowed to use even *unlawfully* obtained evidence for purposes of *impeachment or rebuttal*. But, here, the Kansas Supreme Court barred the State from using *lawfully* obtained evidence for *any* purpose, even when the defendant himself put his mental state into play.

3. There also is a division of authority on the interrelated question of whether evidence from a court-ordered mental evaluation may be used to *impeach* the defendant's own trial testimony. Compare *United States v. Leonard*, 609 F.2d 1163 (5th Cir. 1980) (holding such statements are admissible solely on the issue of sanity) with *United States v. Castenada*, 555 F.2d 605 (7th Cir. 1977) (holding such statements are admissible for impeachment purposes). That question also is squarely presented here.

I. The Kansas Supreme Court's decision conflicts with decisions of this Court, as well as with the decisions of several Circuits and a majority of state courts of last resort.

In *Estelle v. Smith*, 451 U.S. 454 (1981), the Court held that evidence from a court-ordered competency examination of a defendant could not be used against the defendant when he had neither initiated the examination nor put his mental state into issue at trial. In *Buchanan v. Kentucky*, 483 U.S. 402, 422 (1987), the Court clarified the scope of *Smith*, holding that the *Smith* rule does not apply "if a defendant requests such an evaluation or presents psychiatric evidence ...." Rather, when a defendant asserts a mental status defense – such as the "extreme emotional disturbance"

defense at issue in *Buchanan* – giving rise to a court-ordered mental evaluation, and then presents evidence at trial to support the defense, "at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution." *Id.* at 422-23. *See also Powell v. Texas*, 492 U.S. 680, 685 (1989) (*per curiam*) ("it may be unfair to the state to permit a defendant to use psychiatric testimony without allowing the state a means to rebut that testimony"); *id.* ("In that case [*Buchanan*], the Court held that the defendant waived his Fifth Amendment privilege by raising a mental-state defense.").

The Kansas Supreme Court here reached a result that is contrary to the reasoning of both *Smith* and *Buchanan*, even if this case in some sense might be distinguishable because there was no court-ordered mental examination in the state prosecution (although there was in the earlier federal prosecution, and that evaluation was ordered on the basis of the same defense—voluntary intoxication—that the defendant raised in the state prosecution). The essential rationale of *Buchanan* appears to be the notion that a defendant cannot have his cake and eat it too, by asserting a mental state defense but then trying to immunize himself at trial from contrary rebuttal evidence that is lawfully in the State's possession.

A. Importantly, the Kansas Supreme Court's technical reliance on state law labels attached to the defense asserted, and the type of expert evidence presented, to determine the scope of Cheever's Fifth

Amendment privilege conflicts sharply with the decisions of several circuits and a number of state courts. For example, in *United States v. Curtis*, 328 F.3d 141 (4th Cir. 2003), the Fourth Circuit considered the Fifth Amendment claim of a defendant who introduced "expert testimony in support of his defense that he suffered from a 'cognitive dysfunction' which made him 'more susceptible to entrapment by government agents' and that this condition was caused by an explosion resulting in a head injury he received while working in a steel mill ...." *Id.* at 142. The court had ordered a psychiatric evaluation after the defendant gave notice of this defense, and at trial "Curtis introduced testimony from his own psychiatrist and psychologist to support his mental status defense. The government then introduced psychiatric testimony [from the court-ordered evaluation] in rebuttal." *Id.* at 144.

Phrasing the question as "whether the government violated Curtis's constitutional rights when it introduced psychiatric testimony based on interviews conducted with Curtis pursuant to the government's motion for a competency evaluation," *id.* at 143, the Fourth Circuit emphatically rejected the defendant's claim. The Fourth Circuit pointed out that the government "called its own experts only to rebut Curtis's diminished capacity defense," *id.* at 144, and the "experts' testimony related solely to the validity of Curtis's alleged mental condition as to which he introduced psychiatric testimony." *Id.* The court held that

> [w]e have addressed this issue and found that "[w]hen a defendant asserts a mental status

> defense and introduces psychiatric testimony in support of that defense, he may face rebuttal evidence from the prosecution taken from his own examination .... That defendant has no Fifth Amendment protection against the introduction of mental health evidence in rebuttal."

Id. at 144-45 (quoting *Savino v. Murray*, 82 F.3d 593, 604 (4th Cir. 1996)) (emphasis omitted).

Similarly, in *Schneider v. Lynaugh*, 835 F.2d 570 (5th Cir. 1988), the Fifth Circuit approved the state's use of psychiatric evidence to rebut the testimony of various non-psychiatric defense witnesses regarding the defendant's mental state. *Id.* at 575-77. The *Schneider* court read *Buchanan* to hold that "a defendant who puts his mental state at issue with psychological evidence may not then use the Fifth Amendment to bar the state from rebutting in kind." *Id.* at 575. Rather, the *Buchanan* principle reflects a "fair state-individual balance." *Id.* at 576. "It is unfair and improper," the Fifth Circuit held, "to allow a defendant to introduce favorable psychological testimony and then prevent the prosecution from resorting to the most effective and in most instances the only means of rebuttal: other psychological testimony." *Id. See also Hernandez v. Johnson*, 248 F.3d 344, 348 (5th Cir. 2001) ("As *Buchanan* teaches, defense counsel was on notice that if he attempted to put mental status in play, the State might draw upon the [court-ordered] examination in rebuttal.")

Nor did it matter to the Fifth Circuit in *Schneider* that the defense witnesses "were not psychiatrists or

psychologists, but social workers and counselors." 835 F.2d at 576. Such testimony went beyond "lay testimony," and in effect was presented as expert mental-status evidence within the ambit of *Buchanan*, allowing the State to present expert testimony in rebuttal. *Id.* Here, Cheever used an expert who testified directly and extensively about Cheever's mental state and Cheever's capacity to commit capital murder. In the Fourth and Fifth Circuits, it is clear that the prosecution would have been allowed to rebut Cheever's expert with Dr. Welner's expert testimony, and that conclusion is fully consistent with the reasoning and holdings of both *Buchanan* and *Smith*.

Likewise, the Kansas Supreme Court's reliance on what constitutes a mental disease/defect defense under Kansas law to determine the scope of Cheever's Fifth Amendment privilege conflicts with the Ninth Circuit's decision in *United States v. Halbert*, 712 F.2d 388 (9th Cir. 1983). Defendant Halbert argued that because he raised a defense of diminished capacity rather than insanity, evidence from a court-ordered mental examination should not have been admitted in rebuttal against him. *Id.* at 389-90. This argument is indistinguishable from the argument Cheever made to the Kansas Supreme Court in this case.

The Ninth Circuit, however, contrary to the Kansas Supreme Court, held that "Halbert's argument elevates form over substance," and that the psychiatric evidence was admissible as it "related to mental capacity in general," 712 F.2d at 390, an issue that the defendant put into play with his own evidence. After all, "[b]oth defenses thus hinge on the workings of a defendant's mind at the time of the offense. No principled reason

exists to allow psychiatric probing of these workings when insanity is at issue but to disallow it on the issue of diminished capacity." *United States v. White*, 21 F. Supp. 1197 (E.D. Cal. 1998). *See also White v. Mitchell*, 431 F.3d 517, 536-37 (6th Cir. 2005) (finding no Fifth Amendment violation when the prosecution used evidence from court-ordered mental exam in rebuttal after the defendant presented expert evidence regarding his mental state, even though he had withdrawn his insanity defense); *United States v. Madrid*, 673 F.2d 1114, 1121 (10th Cir. 1982) (the State's rebuttal evidence did not violate the Fifth Amendment when the defendant either initiated the court-ordered evaluation and/or introduced psychiatric evidence at trial); *Lee v. Thomas*, No. 10-0587-WS-M, 2012 WL 1965608, at *27 (S.D. Ala. May 30, 2012) ("Numerous courts have construed the *Smith / Buchanan* line of authorities as allowing the prosecution to put on psychiatric evidence where the defendant presents a defense relating to his mental state and utilizes expert testimony to advance it.")

B. A number of state courts have come to similar conclusions as the federal Circuits. For example, in *Commonwealth v. Ostrander*, 805 N.E.2d 497, 504-06 (Mass. 2004), the Supreme Court of Massachusetts held that where a defendant challenges the voluntariness of his confession through expert neuropsychological testimony, evidence from a court-ordered psychiatric evaluation is admissible without violating the Fifth Amendment. The court identified two reasons for its conclusion: (1) "a defendant who seeks to put in issue his statements as the basis of psychiatric expert opinion in his behalf opens to the State the opportunity to rebut such testimonial

evidence in essentially the same way as if he had testified'" (quoting *Blaisdell v. Commonwealth*, 364 N.E.2d 191 (Mass. 1977)); and (2) "where a defendant places at issue his mental state at a critical time, the jury should have the benefit of 'countervailing expert views, based on similar testimonial statements of a defendant' in order to reach a fair result ...." (quoting *Blaisdell, supra*). 805 N.E.2d at 504-505. The court rejected "the defendant's narrow interpretation of the relevant case law, because it does not take into account that it is the defendant who is placing his mental state at issue, and the challenged mental state does not concern a collateral issue, but rather a defense set forth by the defendant." *Id.* at 505.

In *State v. Fair*, 496 A.2d 461 (Conn. 1985), the Supreme Court of Connecticut held that when a criminal defendant asserts a mental-status defense, he waives his Fifth Amendment privilege and the State may use evidence from a court-ordered mental evaluation in rebuttal, even when the defendant relies only on lay testimony: "A criminal defendant waives this [Fifth Amendment] privilege when he places his mental status in issue" and it is clear "that a defendant who claims extreme emotional disturbance places his mental status in issue." 496 A.2d at 463. The court further held that treating such decisions as a waiver of the Fifth Amendment privilege "strikes a balance between the legitimate needs of the state and the cognizable rights of the defendant." *Id.* at 464. Moreover, it makes no difference whether the defendant puts emotional disturbance in issue by his own testimony or through expert testimony:

> It would be anomalous to hold that a defendant can put his mental status in issue only through expert testimony when he can also meet his burden of proof on the issue of extreme emotional disturbance simply by offering his own testimony or the testimony of lay witnesses. Any defendant who asserts the defense of extreme emotional disturbance, whether or not he resorts to offering psychiatric testimony, raises the issue of his mental status and hence relinquishes his privilege against submitting to court-ordered psychiatric examination.

Id.

The Washington Supreme Court held in *State v. Hutchinson*, 766 P.2d 447 (Wash. 1989), that the Fifth Amendment does not prohibit a compelled mental examination of a defendant raising a mental status defense other than insanity, nor the use of evidence from that examination by the prosecution in rebuttal. "If a defendant asserts a lack of mental capacity, whether it is called diminished capacity or insanity, he is required to undergo a court ordered psychiatric examination." *Id.* at 452. Indeed, the court went on to emphasize that "a defendant who asserts diminished capacity waives both the physician-patient privilege and the privilege against self-incrimination" because "there is no distinction between insanity and diminished capacity in this regard and [] the allowance of a privilege would deprive the State and the jury of important evidence on the defendant's mental condition." *Id.* at 453.

Finally, Maryland's highest court held in *Hartless v. State*, 611 A.2d 581, 584 (Md. 1992), that, consistent with *Buchanan*, most state courts "have found no constitutional impediment to allowing the State to secure a mental examination of a defendant and to present rebuttal expert testimony in cases involving mental status defenses other than insanity." The Maryland Court of Appeals emphasized that "the underlying concern is that in order for the State to be able to bear effectively its burden of proving guilt, or of meeting an affirmative defense, it must have the means to adequately assess and, if necessary, rebut a defendant's expert psychiatric testimony." *Id.*

Similar to this case, the defendant in *Hartless* sought to present expert testimony that he lacked "the specific intent required for premeditated murder," *id.* at 585, while precluding the State from responding with evidence from a court-ordered mental evaluation, but the court flatly rejected the defendant's ploy: "there is substantial authority supporting the position that the State constitutionally may be permitted to have access to evidence on an issue the defendant has introduced and that, for rebuttal purposes, 'the state must be able to follow where [the defendant] has led.'" *Id.* at 586 (quoting *United States v. Byers*, 740 F.2d 1104, 1113 (D.C. Cir. 1984)). *Cf. Arnold v. Commonwealth*, 192 S.W.3d 420, 423-25 (Ky. 2006) (no error in permitting the State to use psychiatric evidence to rebut defendant's claim that he was voluntarily intoxicated and lacked the mental state necessary to commit the charged offense).

C. Nevertheless, some courts and commentators have suggested that "[f]ederal case law has not been

uniform ... with respect to the admissibility of expert testimony on the issue of intent when the defense of insanity is not raised." *Troiani v. Poole*, 858 F. Supp. 1051, 1056 (S.D. Cal. 1994); *see also United States v. Vazquez-Pulido*, 155 F.3d 1213, 1217-19 (10th Cir. 1998) ("We are unwilling to adopt a per se rule making all test results arising from pretrial competency evaluations inadmissible at trial .... We think the better approach ... is to evaluate the evidence on a case-by-case basis for relevance, prejudice or confusion of the issues."); *United States v. Childress*, 58 F.3d 693, 727-30 (D.C. Cir. 1995) (discussing admissibility of mental condition evidence following Insanity Defense Reform Act of 1984); *United States v. Cameron*, 907 F.2d 1051, 1062-67 (11th Cir. 1990) (discussing the "persistent confusion surrounding the precise definition of the terms 'diminished capacity' or 'diminished responsibility,'" and various approaches taken by federal courts in determining admissibility of psychiatric evidence); Wright, Miller, *et al.*, 1A *Federal Practice and Procedure* § 208 ("While the issue is not free from doubt, it appears that no statement made by the defendant in the course of the mental examination may be admitted into evidence against him or her on the issue of guilt, although at least two courts have indicated that the statements may be used to impeach or for rebuttal."); *see also Hartless, supra*, 611 A.2d at 584 ("The [*Buchanan*] Court did not expressly define what means of rebuttal are constitutionally permissible.").

This would be an appropriate case for the Court to clear up any remaining confusion.

D. A few state supreme courts, like the Kansas Supreme Court, have found a Fifth Amendment violation in circumstances similar to those presented here. For instance, in *State v. Vosler*, 345 N.W.2d 806 (Neb. 1984), the defendant gave notice that at trial he would claim and present expert testimony that he shot his wife's paramour because of an "irresistible impulse." The State then sought and obtained a psychiatric evaluation of the defendant, but when the State used that evidence at trial, the Nebraska Supreme Court found a Fifth Amendment violation.

The Nebraska Supreme Court held that where a defendant introduces psychiatric evidence of his mental condition in order to contest that he acted with the requisite criminal intent rather than to assert an insanity defense, the Fifth Amendment precludes the State from introducing evidence from a court-ordered mental evaluation. The Nebraska court found a constitutional distinction between a defendant denying he had the requisite mental state and a defendant asserting an insanity defense, because "a person who introduces evidence of his mental condition to rebut the presumption that the act he performed was coupled with the requisite intent makes no admission of the crime." *Id.* at 813. Thus, "[i]n such a situation the fifth amendment requires that the State prove its case without compelling the defendant to submit to interviews by those in its employ." *Id.* Such reasoning would seem to support the decision of the Kansas Supreme Court in this case.

Similarly, in *State v. Lefthand*, 488 N.W.2d 799, 800-01 (Minn. 1992), the Minnesota Supreme Court held that a defendant's assertion of a "voluntary

intoxication" defense does not sufficiently put his mental state at issue to justify the State using evidence from a court-ordered mental evaluation in rebuttal. Instead, such a defense (the very defense Cheever purported to assert here) "is directed solely to refuting certain elements of the crimes with which he had been charged, not to advance a defense of mental illness or mental deficiency." *Id.* at 800-01. Under such circumstances, a court-ordered psychiatric evaluation violated a provision of Minnesota law which itself "secur[ed] the defendant's Fifth Amendment right against self-incrimination." *Id.* at 801.

The Kansas Supreme Court's decision here deepens the split of authority, and takes the wrong side in the debate. The better view is that the "5th amendment does not prohibit the use of a defendant's statements which are made during a court-ordered or court approved mental examination so long as they are offered strictly to rebut the defendant's state of mind at the time the offense was committed." *Troiani*, 858 F. Supp. at 1056 (citations omitted); Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure*, § 20.4(e) at 907 (2d ed. 1992) ("The defendant, in choosing to use his own expert testimony, is taken as agreeing to submit the subject of that testimony to the other side for the same use as has been made by his experts."). Nor can the scope of the Fifth Amendment privilege turn upon technicalities of state law defenses: "The admissibility of such evidence is not limited to evidence of mental disease or defect bearing upon the affirmative defenses of insanity or diminished capacity; testimony which bears upon the existence of the mental state required by the offense charged is also admissible." *Troiani*, 858 F. Supp. at 1056.

The reasoning of *Buchanan*, as correctly understood by the Fourth, Fifth, and Ninth Circuits, as well as a number of lower federal courts and state courts of last resort, is sound. The Kansas Supreme Court's contrary reasoning is not, and deepens a split of authority on the first question presented.

II. The Kansas Supreme Court incorrectly relied on state law to define the scope of the Fifth Amendment.

A. Perhaps the most fundamental flaw in the Kansas Supreme Court's decision is that court's reliance on state law to determine the scope of the Fifth Amendment privilege against self-incrimination. App. 31-35 (relying on a distinction in Kansas law between the state law defenses of mental disease/defect and voluntary intoxication, specifically Kan. Stat. Ann. §§ 22-3219 and 22-3220). That was constitutional error: "The question of a waiver of a federally guaranteed constitutional right is, of course, a *federal question controlled by federal law*." *Brookhart v. Janis*, 384 U.S. 1, 4 (1966) (emphasis added).

Furthermore, the Kansas Supreme Court's distinction between state law defenses of mental disease/defect and voluntary intoxication is both substantively artificial and contrary to precedent. Indeed, federal precedent makes clear that what is determinative for constitutional purposes is not the label state law (or federal statutory law, for that matter) attaches to the defense, but the *substance* of the evidence a defendant actually presents regarding his mental state and potential criminal culpability. *See, e.g., Curtis*, 328 F.3d at 143-45; *Schneider*, 835 F.2d at

575-77; *Halbert*, 712 F.2d at 389-90; *White*, 21 F. Supp. 2d at 1200-01; *Troiani*, 858 F. Supp. at 1055-56. If a defendant puts his mental state in play at trial, then he has waived the Fifth Amendment privilege with respect to evidence of his mental state.

The Kansas Supreme Court's error in relying on Kansas law to determine the scope of the Fifth Amendment is further illustrated by the facts that (1) the Kansas statutes on which that court relied are in reality intended to *protect the prosecution* from unfair surprise at trial by a defendant who decides to raise a belated mental state defense, and that (2) voluntary intoxication is plainly a "mental-state" defense. For instance, K.S.A. § 22-3219 makes clear that its purpose is to ensure fairness: "Evidence of mental disease or defect excluding criminal responsibility *is not admissible upon a trial unless the defendant serves upon the prosecuting attorney and files with the court a written notice* of such defendant's intention to assert the defense that the defendant, as a result of mental disease or defect lacked the mental state required as an element of the offense charged ...." Moreover, under Kansas law, a defense of "voluntary intoxication" is a defense *only if* the asserted intoxication bears directly on "a particular *intent or other state of mind* [that] is a necessary element to constitute a particular crime." K.S.A. § 21-5205(b) (emphasis added).

Thus, the Kansas Supreme Court erred in relying on state rather than federal law in determining whether Cheever had waived his Fifth Amendment privilege, and it also flipped on their heads the Kansas statutes on which the court purported to rely. In fact,

the Kansas statutes do not purport to determine the scope of the Fifth Amendment, nor do they support the court's result.

B. The Kansas Supreme Court also turned a blind eye to the circumstances that gave rise to Dr. Welner's rebuttal testimony. The federal court order directing Cheever to undergo a mental examination was based precisely on Cheever's filing of notice in federal court under Fed. R. Crim. P 12.2 that he would assert a defense of *voluntary intoxication*. Thus, in the federal case, Dr. Welner conducted his evaluation of Cheever on the very same grounds on which Dr. Welner testified in rebuttal in the state prosecution. Had Cheever presented the same testimony of Dr. Evans in the federal prosecution, there is no doubt that Dr. Welner's testimony would have been admissible in rebuttal. It is truly elevating for(u)m over substance to hold that the Fifth Amendment requires different results, depending on whether the prosecution occurs in a federal or a state court.

With all due respect, the federal court result is the constitutionally correct result. By presenting expert testimony that put into play his mental state at the time of the crimes, Cheever waived his Fifth Amendment privilege. The Kansas Supreme Court, however, either ignored or misunderstood the significance of Cheever's federal proceedings. That court instead found under Kansas law a constitutionally determinative distinction between the defenses of mental disease/defect and voluntary intoxication, a distinction that does not exist in the Fifth Amendment, or in this Court's cases interpreting that amendment.

C. The Kansas Supreme Court also disregarded the fact that Cheever's expert witness relied in part *on Dr. Welner's report from the federal proceeding* in reaching his own opinion. It is the epitome of unfairness and inconsistency to permit a defendant to use an expert who in turn is relying on the work of an expert that the state wants to use in rebuttal, but not permit the state to present its expert as a rebuttal witness. That is a one-way street with a vengeance.

Nor is there any merit to the Kansas Supreme Court's curious conclusion that nothing in the record established that Dr. Evans relied on Dr. Welner's report, App. 38-39, because defense counsel *stipulated* that Dr. Evans relied on Dr. Welner's report. App. 106 (defense counsel responding to trial court's question whether Dr. Evans relied on Dr. Welner's report, "That's true, he did."). Thus, even apart from putting his mental state in play, Cheever also waived any Fifth Amendment privilege with regard to Dr. Welner's report when Cheever's own expert relied on that very report.

Only by ignoring these multiple waivers, and instead relying upon a questionable interpretation of Kansas law, could the Kansas Supreme Court find a Fifth Amendment violation in this case. In effect, by labeling Cheever's mental state defense "voluntary intoxication" rather than "mental disease/defect," the Kansas Supreme Court allowed Cheever to present an allegedly scientific, mental-state defense through his own and expert testimony, while at the same time immunizing that defense from effective rebuttal or impeachment evidence. That result is both constitutional error and manifestly unfair, as any

number of courts including this one have recognized. *See, e.g.*, *Powell*, 492 U.S. at 685 ("it may be unfair to the state to permit a defendant to use psychiatric testimony without allowing the state a means to rebut that testimony").

D. Finally, the Kansas Supreme Court's decision also creates a legal anomaly in a more general sense. In both *Harris v. New York*, 401 U.S. 222 (1971), and *Kansas v. Ventris*, 556 U.S. 586 (2009), the Court ruled that evidence obtained in violation of the Constitution still could be used for impeachment, in part to keep defendants honest and in part to ensure that juries can consider all probative evidence. Yet, under the Kansas Supreme Court's ruling here, the State cannot use some evidence indisputably obtained through *lawful* means either to rebut or impeach defense evidence. This contradiction presents yet another reason why the Court should grant review to resolve the split of authority and clear up any remaining confusion.

III. There is a split of authority on the closely related question of whether evidence from a court-ordered mental evaluation may be used to impeach a defendant's own trial testimony.

On the issue of whether statements Cheever made to Dr. Welner could be used for purposes of *impeaching* Cheever's own trial testimony, the Kansas Supreme Court correctly noted that there is a split in authority. In *United States v. Leonard*, 609 F.2d 1163, 1165-67 (5th Cir. 1980), the Fifth Circuit held that mental evaluation evidence is admissible *solely* on the issue of *sanity*. But, in *United States v. Castenada*, 555 F.2d

605, 609 (7th Cir. 1977), the Seventh Circuit held that a defendant's trial testimony may open the door to the use of evidence from a court-ordered mental evaluation for general impeachment purposes.

Some state courts have followed *Leonard*, and prohibited the use of a defendant's statements made during a psychiatric examination for impeachment purposes. *See Smith v. Commonwealth*, ___ S.W.3d ___ (Ky. 2012) (2012 WL 4222211 at *2-3) (limiting evidence to expert opinion on psychiatric condition and excluding defendant's statements to the expert); *People v. Pokovich*, 141 P.3d 267, 276 (Cal. 2006) (holding that the Fifth Amendment prohibits the prosecution from using statements made during a court-ordered competency examination for impeachment purposes); *State v. Lefthand*, 488 N.W.2d 799, 801 (Minn. 1992) (holding admission of statements for impeachment would violate the Fifth Amendment); *People v. Jacobs*, 360 N.W.2d 593, 595-96 (Mich. Ct. App. 1984) (same; citing *Leonard*).

Several other courts, however, have found the reasoning of *Castenada* persuasive and held that a defendant's statements made in a court-ordered evaluation may be used for impeachment purposes when a defendant puts his mental state in play at trial. *See Booker v. Wainwright*, 703 F.2d 1251, 1258 (11th Cir. 1983) (citing *Harris v. New York*); *State v. Holland*, 656 P.2d 1056, 1064 (Wash. 1983) (same); *United States v. Issaghoolin*, 42 F.3d 1175, 1177 (8th Cir. 1994) (permitting information from a defendant's pretrial services report to be used for impeachment); *State v. Tryon*, 431 N.W.2d 11, 17 (Iowa Ct. App. 1988) (evidence properly admitted for rebuttal). Interestingly,

in *Felde v. Blackburn*, 795 F.2d 400, 404 (5th Cir. 1986), a case that never cites or mentions *Leonard*, the Fifth Circuit itself held that statements made during a psychiatric examination could be used for impeachment and rebuttal purposes.

In this case, Cheever testified that he did not know that Sheriff Samuels was coming up the stairs, that he thus was caught by surprise when the Sheriff appeared, and that he simply panicked and fired at the Sheriff without thinking. App. 107-111. On cross-examination, Cheever denied hearing the Sheriff say that he was going to look upstairs. It was at that point that the State used contrary statements Cheever made to Dr. Welner (about Cheever's realization that the Sheriff was looking for him and coming up the stairs) to impeach Cheever. App. 112-26. On appeal, Cheever argued that this impeachment violated his Fifth Amendment privilege.

Although the Kansas Supreme Court ostensibly avoided giving a conclusive answer to this particular question, App. 37-38, the court's reasoning in rejecting the State's use of Dr. Welner to rebut the testimony of Cheever's expert implicitly rejected the State's arguments in favor of using Cheever's statements to Dr. Welner for impeachment. Furthermore, the Kansas Supreme Court rejected the State's analogy to *Harris v. New York* and *Kansas v. Ventris* as a basis for admitting the evidence as impeachment. App. 36.

The impeachment use of such evidence is inextricably bound up with and logically follows from the use of such evidence to rebut testimony of a defendant's expert. In these circumstances, the Court

certainly may and should grant review of both of these closely-related Fifth Amendment questions in order to resolve the splits of authority that exist.

CONCLUSION

The State of Kansas respectfully requests that the Petition for a Writ of Certiorari be granted or, in the alternative, that the Court grant review and summarily reverse the erroneous decision of the Kansas Supreme Court.

Respectfully submitted,

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APPENDIX

APPENDIX

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 99,988

[Filed September 10, 2012]

STATE OF KANSAS, *Appellee*,	)
v.	)
SCOTT D. CHEEVER, *Appellant*.	)

SYLLABUS BY THE COURT

1. Under K.S.A. 21-4627, in death penalty appeals, the Supreme Court of Kansas must consider any errors asserted in the review and appeal regardless of whether the issue was preserved below. This provision creates a mandatory exception to the various statutes and rules barring consideration of unpreserved issues and supersedes the contemporaneous objection rule of K.S.A. 60-404.

2. Unassigned errors in a death penalty appeal under K.S.A. 21-4627 are errors that have not been raised by the parties, but are noticed by the court on its

own during its review of the record. Review of unassigned errors under K.S.A. 21-4627 is permissive and subject to conditions: The error must be apparent from the record and addressing it serves the ends of justice.

3. A claim that admission of evidence violated a constitutional right is reviewed de novo.

4. The prosecution's use of a court-ordered mental examination of a defendant to establish an element necessary for conviction or punishment implicates the United States Constitution's Fifth Amendment privilege against compelled self-incrimination when the defendant neither initiated the examination nor introduced a mental-state defense at trial.

5. When a defendant files a notice of intent to assert a mental disease or defect defense under K.S.A. 22-3219, the Fifth Amendment privilege against compelled self-incrimination does not prevent the court from ordering the defendant to submit to a mental examination. The filing of such a notice constitutes consent to a court-ordered mental examination by an expert for the State. Consent to the examination, however, does not waive the defendant's Fifth Amendment privilege so as to entitle the State to use the examination against the defendant at trial. Waiver does not occur unless or until the defendant presents evidence at trial that he or she lacked the requisite criminal intent due to a mental disease or defect. If that occurs, the State may use the examination for the limited purpose of rebutting the defendant's mental disease or defect defense.

6. Evidence that voluntary intoxication caused defendant's temporary mental incapacity at the time of the crime is not evidence of a mental disease or defect.

7. Evidence of defendant's permanent mental incapacity due to long-term use of intoxicants may support a mental disease or defect defense.

8. An error that violates a criminal defendant's constitutional rights requires reversal unless the party who benefitted from the error proves beyond a reasonable doubt that the error complained of did not affect the outcome of the trial in light of the entire record, *i.e.*, proves there is no reasonable possibility that the error affected the verdict. The question is not whether the legally admitted evidence was sufficient to support the verdict, but, rather, whether the State has proved beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.

9. The generic crime of homicide, of which murder is the highest and most criminal species, is of various degrees, and encompasses every mode by which the life of one person is taken by the act of another.

10. Capital murder is first-degree murder, with one or more specific elements beyond those required to prove premeditated murder. It follows that capital murder is the highest degree of homicide in Kansas.

11. With capital murder as the highest degree of homicide in Kansas, first-degree murder is a lesser degree of capital murder under K.S.A. 21-3107(2)(a) and is therefore a lesser included crime of capital

murder. Because first-degree murder encompasses the two alternative means of premeditated murder and felony murder, felony murder is a lesser included crime of capital murder.

12. Remarks by a prosecutor or trial judge that lead a capital sentencing jury to believe that responsibility for determining the appropriateness of a death sentence ultimately rests with the appellate courts undermines the demand of the Eighth Amendment to the United States Constitution for heightened reliability in the jury's determination that death is the appropriate sentence in a specific case.

13. When a trial judge tells jurors, even prospective jurors, that the exhibits and transcripts of the proceedings will be reviewed by an appellate court in deciding issues raised in the event of an appeal, error has occurred.

14. The Eighth and Fourteenth Amendments to the United States Constitution forbid the imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed. A capital defendant's age of 18 years or older at the time of the offense is an eligibility requirement for the death penalty.

15. Because a death sentence cannot be imposed in Kansas based solely on the fact of conviction for capital murder under K.S.A. 21-4624, the Sixth Amendment to the United States Constitution demands that any additional fact necessary for imposition of the death penalty must be found by a jury beyond a reasonable

doubt. This includes the fact that a defendant was 18 years old or older at the time of the capital crime.

16. The Eighth Amendment requires two things of a death sentence: (1) The sentencer must not have unbridled discretion in determining the fate of the defendant, and (2) the defendant must be allowed to introduce any relevant mitigating evidence of his or her character or record or circumstances of the offense. A mercy instruction per se is not required as part of this equation by federal or state law, nor is a specific type of mercy instruction.

17. Kansas law does not require that jurors in a death penalty case be instructed that they have the power to exercise mercy after weighing aggravators and mitigators.

18. To satisfy the Eighth Amendment's concern for reliability in the determination that death is the appropriate sentence in a specific case, a capital sentencing jury must not be precluded from considering and giving effect to relevant mitigating evidence. It is not relevant under the Eighth Amendment whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute, by an evidentiary ruling, by jury instructions, or by prosecutorial argument.

19. The Eighth Amendment is violated only where the jury is prevented, as a matter of law, from considering mitigating evidence. The Eighth Amendment does not prohibit a capital sentencing jury from assessing the weight of mitigating evidence and finding it wanting as a matter of fact; thus, it is

constitutionally permissible for a prosecutor to argue that, based on the circumstances of the case, the defendant's mitigating evidence is entitled to little or no weight.

Appeal from Greenwood District Court; MICHAEL E. WARD, judge. Opinion filed August 24, 2012. Affirmed in part, reversed in part, and remanded with directions.

Debra J. Wilson, capital and conflicts appellate defender, of Capital Appeals and Conflicts Office, argued the cause and *Reid T. Nelson*, capital and conflicts appellate defender, was with her on the briefs for appellant.

Kristafer R. Ailslieger, deputy solicitor general, argued the cause, and *Clay Britton*, assistant attorney general, and *Steve Six*, attorney general, were with him on the brief for appellee.

The opinion of the court was delivered by

Per Curiam: A jury convicted Scott D. Cheever of capital murder for the killing of Greenwood County Sheriff Matthew Samuels (K.S.A. 21-3439[a][5]), four counts of attempted capital murder of law enforcement officers Robert Keener, Travis Stoppel, Mike Mullins, and Tom Harm (K.S.A. 21-3439[a][5]; K.S.A. 21-3301[a]), criminal possession of a firearm based on a previous felony conviction for aggravated robbery (K.S.A. 21-4204[a][3]), and manufacture of methamphetamine (K.S.A. 65-4159[a]). Cheever was sentenced to death on the capital offense. In addition, he was given a controlling sentence of 737 months for

the attempted capital murder convictions, which included concurrent sentences of 146 months for the manufacturing conviction and 8 months for the firearm conviction. Cheever filed a timely appeal of his convictions and sentences. We have jurisdiction under K.S.A. 21-4627(a) ("A judgment of conviction resulting in a sentence of death shall be subject to automatic review by and appeal to the supreme court of Kansas.").

We conclude that allowing the State's psychiatric expert, Dr. Michael Welner, to testify based on his court-ordered mental examination of Cheever, when Cheever had not waived his privilege under the Fifth Amendment to the United States Constitution in that examination by presenting a mental disease or defect defense at trial, violated Cheever's privilege against compulsory self-incrimination secured by the Fifth and Fourteenth Amendments to the United States Constitution. Because we are unable to conclude beyond a reasonable doubt that Welner's testimony did not contribute to the capital murder and attempted capital murder verdicts obtained in this case, this constitutional error cannot be declared harmless. Consequently, Cheever's convictions for capital murder and attempted capital murder must be reversed and remanded for a new trial.

Cheever did not challenge his convictions and sentences for manufacture of methamphetamine and criminal possession of a firearm. We affirm those convictions and sentences.

FACTS AND PROCEDURAL BACKGROUND

On January 19, 2005, Scott D. Cheever shot and killed Greenwood County Sheriff Matthew Samuels at Darrell and Belinda Coopers' residence near Hilltop, Kansas. Samuels, acting on a tip, had gone to the Coopers' residence, along with Deputy Michael Mullins and Detective Tom Harm, to attempt to serve an outstanding warrant for Cheever's arrest. Cheever, along with the Coopers, Matt Denney, and Billy Gene Nowell, had been cooking and ingesting methamphetamine in the early morning hours prior to Samuels' arrival. In the ensuing attempts to remove the wounded Samuels from the residence and arrest Cheever, Cheever also shot at Mullins, Harm, and two state highway patrol troopers, Robert Keener and Travis Stoppel.

At trial, the facts surrounding the shootings were recounted by several witnesses including the Coopers, the surviving law enforcement officers, and by Cheever himself. There was little discrepancy in the pictures painted by the various accounts.

Shortly before Samuels, Mullins, and Harm arrived at the Coopers, Belinda had received a telephone call informing her that the police were on their way to the house to look for Cheever. Belinda told Cheever the police were coming and asked him to get his stuff together and leave, but Cheever's car had a flat tire.

When Samuels arrived at the Cooper's house, Cheever and Denny were hiding in an upstairs bedroom. Cheever had two guns with him – a .44 caliber Ruger revolver and a .22 caliber semi-automatic

pistol. As he hid upstairs, Cheever heard the officers pull up to the house and heard Darrell yell that the cops were there and that he was going to tell them Cheever was not there. Cheever also heard Darrell answer the door and tell Samuels Cheever was not there. Cheever heard Darrell agree to allow Samuels inside to look around.

Cheever heard Samuels calling out his name as he looked for Cheever on the first floor. The doorway to the upstairs had a piece of carpet covering it and Samuels asked Belinda where the doorway led. Belinda said it went upstairs. Samuels pulled the carpet back and yelled for Cheever. Cheever looked over at Denny and told him, "Don't move, don't make a sound, just stay right where you are." Samuels then went through the doorway to go upstairs.

Cheever heard Samuels' steps on the stairs. Cheever had the loaded and cocked .44 in his hand when he stepped out of the bedroom and looked down the stairway. Cheever saw Samuels coming up the stairs. Cheever pointed his gun and shot Samuels. Cheever then stepped back into the bedroom and told Denny not to go out of the window because they would shoot him. Cheever returned to the stair railing, looked down the stairs, saw Samuels, and shot him again. Cheever stepped back into the bedroom and saw that Denny had left through the window. Cheever then shot at Mullins and Harm as they tried to get the wounded Samuels out of the stairwell. Later, he shot at Keener and Stoppel, who were part of the SWAT team that entered the house to arrest Cheever.

Cheever asserted a voluntary intoxication defense, based on the theory that methamphetamine use had rendered him incapable of forming the necessary premeditation to support the murder and attempted murder charges. Cheever's evidence in support of his defense consisted of his own testimony and the testimony of his expert witness, Dr. Roswell Lee Evans, Jr., a doctor of pharmacy with a specialty in psychiatric pharmacy.

The jury found Cheever guilty on all counts as charged. At the penalty phase, the jury unanimously found beyond a reasonable doubt that the three alleged aggravating circumstances had been proven to exist and that they were not outweighed by any mitigating circumstances found to exist and therefore sentenced Cheever to death. The trial court subsequently accepted the jury's verdict and imposed a sentence of death.

While the facts of the case are relatively straightforward, the procedural history of the case is less so. The case was originally filed in Greenwood County District Court shortly after the crime. At about the same time, this court found the Kansas death penalty scheme unconstitutional in *State v. Marsh*, 278 Kan. 520, 102 P.3d 445 (2004), *rev'd and remanded by Kansas v. Marsh*, 548 U.S. 163, 126 S. Ct. 2516, 165 L. Ed. 2d 429 (2006). The state proceeding was dismissed after federal authorities initiated prosecution in the United States District Court under the Federal Death Penalty Act, 18 U.S.C. § 3591 *et seq.* (2006).

The federal case went to jury trial in September 2006, but 7 days into jury selection, the case was

suspended when Cheever's defense counsel became unable to proceed. The federal case was subsequently dismissed without prejudice and the state case was refiled, went to trial, and resulted in the convictions and sentences before us in this appeal. Additional facts will be included in the discussion where relevant to the issues.

I. COURT-ORDERED MENTAL EXAMINATION

During the course of the federal proceedings, Judge Monte Belot ordered Cheever to undergo a psychiatric examination with Dr. Michael Welner, a forensic psychiatrist hired by the government. While the precise circumstances leading to Judge Belot's order are not in the record before us, the record is sufficient to show that the mental examination was ordered because Cheever had raised the possibility that he would assert a defense based on mental condition. As a result of that order, Cheever submitted to examination by Welner. Welner's interview of Cheever lasted 5 and ½ hours, was videotaped, and resulted in a 230-page transcript.

Welner's examination first became an issue at trial during the State's cross-examination of Cheever. The State sought to use the transcript of Cheever's interview with Welner to impeach Cheever's testimony that he did not hear Samuels ask if he could go upstairs. Defense counsel objected, arguing that because the defense had not filed a notice of intent to rely on a mental disease or defect defense, the State was not entitled to use Welner's examination of Cheever. The trial court allowed the impeachment as "a prior inconsistent statement given to a witness who will testify" after the State confirmed Welner would be

called as a rebuttal witness to Cheever's voluntary intoxication defense.

Cheever's expert witness in support of his voluntary intoxication defense was Dr. Roswell Lee Evans, Jr., a doctor of pharmacy, who specialized in psychiatric pharmacy, the pharmacological effects of drugs, including illegal drugs such as methamphetamine. Evans testified that methamphetamine is a very intense stimulant drug that has three pharmacological phases: the initial rush, the long-term intoxication, and the neurotoxic phase. Evans explained that the initial rush is a virtually instantaneous very extreme high that lasts approximately 30 minutes. Following the initial rush is the long-term intoxication period. He testified that the intoxication lasts about 13 to 14 hours, during which the user is still under the influence of the drug.

Evans testified that while methamphetamine is not pharmacologically addictive, the intense pleasure of the initial rush makes the drug psychologically addictive. Users seek that intense high and therefore, once that starts, they do not have much control over whether they continue to use the drug. However, methamphetamine users develop a tolerance to the initial rush, leading them to increase the frequency of use or the dosage, which then extends the long-term intoxication stage.

The neurotoxic phase, Evans testified, develops in chronic, long-term users. He said that the neurotoxic effect of long-term use can change the structure of the brain, resulting in the loss of gray matter and consequential loss of brain function, including loss of

cognitive functions that deal with planning, assessing consequences, abstract reasoning, and judgment. Evans testified that long-term use can cause paranoid psychosis which, due to impairment of the brain functions responsible for judgment and impulse control, can result in violence. According to Evans, chronic users in a state of paranoid psychosis begin to react – just like the natural reaction to touching a hot stove – to all sorts of stimuli based on their paranoid ideations. While Evans testified that neurotoxic changes could potentially be permanent, his testimony primarily indicated that these changes persist only as the result of continued drug use and would abate after a period of nonuse ranging from 4 to 6 months.

Testifying about Cheever specifically, Evans said that at the time of the crimes, Cheever's drug use had progressed to the point that he had developed neurotoxicity and was showing symptoms of psychosis, evidenced by doing "really stupid judgment kind of stuff." Evans noted that Cheever had progressed to the point where he had become so suspicious of people he was carrying a gun and was reacting to perceived threats that were not real.

Ultimately, Evans testified it was his opinion that at the time Cheever committed these crimes, Cheever was both under the influence of recent methamphetamine use and impaired by neurotoxicity due to long-term methamphetamine use, which affected his ability to plan, form intent, and premeditate the crime. With respect to shooting Samuels, Evans testified that there "was no judgment. There was no judgment at all. This man just did it."

On cross-examination, the State made clear that Evans was not a medical doctor, not a psychiatrist, not a neurologist, and not a psychologist. The State characterized Evans as a "pharmacist."

At the conclusion of Evans' testimony, the defense rested. The State then sought to present Welner as a rebuttal witness. Defense counsel objected, arguing that because Cheever had not asserted a mental disease or defect defense in this case, the State could not use Welner's examination. The State contended that Welner's testimony was proper rebuttal to Cheever's voluntary intoxication defense. Further, the State suggested that Welner's testimony was proper rebuttal because Evans had testified he relied upon Welner's report. The trial court ruled that Welner's testimony was admissible as rebuttal to the voluntary intoxication defense.

Welner's testimony began with a long discourse on his qualifications, his substantial fee, and the extensive methodology he applies to cases under his review. Welner also described in detail the materials he reviewed prior to interviewing Cheever, the 5 and ½ hour interview process, and the psychological testing that was conducted on Cheever.

Welner testified that based on his examination, it was his opinion that on January 19, 2005, Cheever's perceptions and decision-making ability were not impaired by methamphetamine use. Welner told the jury that Cheever had the ability to control his actions, he had the ability to think the matter over before he shot Samuels, and he had the ability to form the intent to kill.

Addressing the relationship between Cheever's level of suspicion on the day of the crimes and his use of methamphetamine, Welner testified that while Cheever was suspicious that morning, his suspicions were reality based – given that Cheever was involved with several people in making illegal drugs and that he knew law enforcement officers were looking for him because he had violated parole. Welner testified that this demonstrated Cheever's suspicions were not irrational. Welner also concluded that there was no change in Cheever's level of suspicion after he used methamphetamine.

Addressing the relationship between Cheever's level of suspicion and violence, Welner testified that Cheever's conduct demonstrated that his suspicions were not a trigger for violence. He considered it significant that, although Cheever had suspicions about the others taking his manufacturing supplies or swindling him in some way, Cheever did not react with violence. Instead, Cheever attempted to gain control over the situation and defuse the perceived threats by giving Denny a walkie-talkie to monitor the area and personally engaging with Nowell, whom he did not trust. Welner testified that Cheever's reactions did not change after he used methamphetamine. Upon learning that the police were on their way, Cheever's response, "Well, I hope everyone is happy," was consistent with his suspicion that everyone at the house was out to get his methamphetamine. Yet despite that suspicion, Cheever did not become hostile or react with threats or violence.

Welner also addressed whether Cheever had suffered any "longstanding-effects" or "brain damage"

as a result of methamphetamine use. He noted that neuropsychological testing conducted by another doctor showed Cheever had high-average executive functioning and response inhibition. Welner testified that Cheever's thought processes and decisions on the day of Samuels' killing were consistent with that finding, demonstrating that Cheever's executive decision-making abilities were not impaired by methamphetamine. To support that conclusion, Welner went through each and every step of the events, describing what Cheever had perceived, every decision Cheever had made, and every resulting action of those decisions:

> "Within that look at executive functioning, Dr. Price found that Mr. Cheever had high average what is known as response inhibition . . . . The reason that that is significant is that it is testing that looks at complex tasks of thinking and processing and also inhibiting response. And when I think about the decisions and processing that he was making all through that day, ['] I'm suspicious of these people, I'm armed, this person is hostile to me, I'm giving him drugs without threat, I'm suspicious of this person, he is unarmed, I am armed, I don't threaten him, I'm not intimidating him,['] I'm talking about Matthew Denny. ['] I hear police. I recognize the voice of this person as someone that I have had positive experiences with. I make a decision not to shoot, but to be silent, with the hope that this person goes away. The person comes near me but turns, and I'm aware of his movements, and still I am quiet and I don't shoot and I don't move. And I don't jump out the window the way

my confederate later does. And when I do shoot, I don't shoot before Matthew Samuels walks through the curtain in such a way that I might scare him, the way my later shots frightened the deputies that came to pull him away, but I shoot him at a point in which he is very much within my range, has passed through that curtain, and I know that he is coming upstairs, and that is when I shoot. And then I stop shooting when someone says stop shooting. And then I continue not to shoot the entire day, not until I know that a SWAT team is making its way up and then I fire shots, and as soon as my bullets expire, I throw my hands up and say I surrender.['] And so this is a whole range of executive decision-making that reflects go, no go, act, don't act. And so it is – his history is consistent with what was found in Dr. Price's testing of, certainly, unimpaired, but what Dr. Price found was that he had high-average response inhibition to his cognitive functioning."

Focusing specifically on the shooting of Samuels, Welner described Cheever's decision-making process:

"The decision-making ability, as I've – as I've assessed it in this case, began with his – his decision-making once it became clear that the police were there. He made a decision not to try to flee, not to try to run. He made a decision to keep himself where he kept himself, as opposed to another part of the house. He made a decision to stay quiet lest any kind of disturbance aroused suspicion from Matthew Samuels downstairs. He made a decision to hold his fire

> when he did, even though he was armed. He made a decision to hold his fire even after Matthew Samuels approached the first time. And he made a decision to hold his fire even though he knew Matthew Samuels was outside and preparing to come back, that he did not shoot out the window or do anything of a provocative and intimidating way to say, 'Stay away, because I will shoot.' And he made a decision to shoot when he did.
>
> "And then he engaged Matthew Denny and then went back and made a decision to shoot again. And then when he stopped shooting he made a decision to stop shooting."

Welner testified he considered and ultimately discounted other factors that could possibly explain Cheever's crimes, such as psychiatric conditions or disorders. He also considered and ultimately discounted environmental phenomena that could influence Cheever's efforts to avoid being taken into custody. Welner told the jury that Cheever identified with and looked up to people that he described as bad boys or outlaws and that he wanted to outdo them. Welner opined that, while it was possible methamphetamine made Cheever more aggressive, it did not affect "his decision to be an outlaw and to identify with outlaws and to make decisions as outlaws do."

Cheever argues that his Fifth Amendment privilege against compulsory self-incrimination was violated when the trial court allowed the State to use the court-ordered mental examination by Welner when

Cheever had not waived his privilege in that examination by asserting a mental disease or defect defense at trial.

A. *Preservation / Standard of Review*

The State argues that Cheever's constitutional challenge to the admission of evidence from the court-ordered examination was not properly preserved for review because he did not object on Fifth Amendment grounds at trial. See K.S.A. 60-404 (a timely and specific objection is required to preserve evidentiary issues for appeal); *State v. Richmond*, 289 Kan. 419, Syl. ¶ 4, 212 P.3d 165 (2009) ("A defendant cannot object to the introduction of evidence on one ground at trial and then assert another ground on appeal.").

Although Cheever disputes the State's contention that his objection was insufficient to preserve his constitutional claim, he argues alternatively that preservation is not fatal to his claim. In support, Cheever relies on the following language of K.S.A. 21-4627(b):

> "[in a death penalty case] [t]he supreme court of Kansas shall consider the question of sentence as well as any errors asserted in the review and appeal and *shall be authorized to notice unassigned errors appearing of record if the ends of justice would be served thereby.*" (Emphasis added.)

Cheever asserts that because Welner's testimony played a large role in the guilt and penalty phases, it

serves the ends of justice to determine whether the use of that evidence violated his constitutional privilege against compelled self-incrimination.

We hold that lack of preservation is not an obstacle to our review, but not because of our authority to notice *unassigned* errors under K.S.A. 21-4627(b), as Cheever argues. K.S.A. 21-4627(b) provides two distinct exceptions in death penalty cases to general rules concerning appellate review: It requires the court to consider all errors asserted on appeal, and it authorizes the court to notice unassigned errors appearing in the record if doing so serves the ends of justice.

The first exception applies to errors raised by the parties. The statute mandates that we consider any errors the parties raise on appeal, whether preserved for review or not. *State v. Kleypas*, 272 Kan. 894, 952, 40 P.3d 139 (2001), *cert. denied* 537 U.S. 834 (2002), *abrogated on other grounds by Kansas v. Marsh*, 548 U.S. 163, 126 S. Ct. 2516, 165 L. Ed. 2d 429 (2006) (K.S.A. 21-4627[b] requires the court to consider the defendant's claims of prosecutorial misconduct "whether or not objected to at trial."). Thus, the statute imposes a mandatory exception in death penalty appeals to the various statutes and rules barring consideration of unpreserved issues. See, *e.g.*, *State v. Bornholdt*, 261 Kan. 644, 651, 932 P.2d 964 (1997), *disapproved on other grounds by State v. Marsh*, 278 Kan. 520, 102 P.3d 445 (2004), *rev'd and remanded on other grounds by Kansas v. Marsh*, 548 U.S. 163 (2006) (construing identical language in K.S.A. 1993 Supp. 21-4627, which applied in hard 40 appeals, the court held the requirement that the court review any error asserted on appeal supersedes the contemporaneous

objection rule of K.S.A. 60-404); *State v. Collier*, 259 Kan. 346, Syl. ¶ 1, 913 P.2d 597 (1996) (special review provision of K.S.A. 1993 Supp. 21-4627 requires court to "consider and reach" each issue raised on appeal, "even if the defendant fail[ed] to raise objections in the trial court").

The second exception applies to unassigned errors. An unassigned error is one *not* raised by the parties but noticed by the court on its own during its review of the record. *Cf. State v. Hayes*, 258 Kan. 629, 637, 908 P.2d 597 (1995) (because defendant did not receive a hard 40 sentence, the court would not search the record for unassigned errors under the special review provision of K.S.A. 1993 Supp. 21-4627). In contrast to our duty to consider all asserted errors, our review of unassigned errors is permissive and conditional. K.S.A. 21-4627(b) (The court "shall be authorized to notice unassigned errors appearing of record if the ends of justice would be served thereby.").

On this issue and throughout his brief, Cheever misses the distinction between these two provisions. Because Cheever raises the Fifth Amendment issue in his brief, it is not an unassigned error; it is an asserted error. Accordingly, we must review Cheever's constitutional claim, notwithstanding the State's contention that Cheever's failure to raise that specific ground at trial precludes appellate review.

Having determined that this issue is reviewable, we next address the standard of review. Because Cheever challenges the legal basis for the admission of this evidence, our standard of review is de novo. *State v. Appleby*, 289 Kan. 1017, 1054-1055, 221 P.3d 525

(2009) (claim that admission of evidence violated the Sixth Amendment's Confrontation Clause reviewed de novo); *State v. White*, 279 Kan. 326, 331-33, 109 P.3d 1199 (2005) (appellate court has unlimited review of claim that evidentiary ruling violated constitutional rights).

B. *Analysis*

Cheever relies primarily on *Estelle v. Smith*, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981), *Buchanan v. Kentucky*, 483 U.S. 402, 107 S. Ct. 2906, 97 L. Ed. 2d 336 (1987), and several related cases to argue that because he had not waived the privilege by presenting evidence of a mental disease or defect at trial, the State was precluded by the Fifth Amendment from using statements he made during Welner's examination, conducted as part of the federal case, against him. The State responds that its use of Welner's examination was proper rebuttal and impeachment.

In *Smith*, the United States Supreme Court held that a court-ordered pretrial psychiatric examination implicated the defendant's rights under the Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, when the defendant neither initiated the exam nor put his mental capacity into issue at trial.

In *Smith*, the trial court ordered a competency examination of the defendant. Defense counsel had not raised an issue of competency or sanity and was unaware that the examination was ordered. 451 U.S. at 456-57 n.1. The psychiatrist interviewed the defendant

and provided a report to the trial court in which he concluded the defendant was competent to stand trial. 451 U.S. at 457-58. During the penalty phase of the defendant's capital trial, the State called the psychiatrist to testify as to the defendant's future dangerousness – one of three factors the State was required to establish to obtain the death penalty under Texas law. The psychiatrist's testimony included his conclusions that the defendant was a "severe sociopath" with no regard for property or human life, that he would continue his criminal behavior if given the opportunity, and that he had no remorse for his actions.

The Court determined that under the "distinct circumstances" of the case, the Fifth Amendment privilege applied to the examination. 451 U.S. at 466. The Court emphasized that the Fifth Amendment is not implicated by an order requiring a criminal defendant to submit to a competency examination "for the limited, neutral purpose of determining . . . competency to stand trial." 451 U.S. at 465. Further, as long as the examination is conducted consistent with that limited purpose and used for that neutral purpose, there is no Fifth Amendment issue. 451 U.S. at 465, 468-69.

The Court noted that although the scope of the examination went beyond the question of competency, it was not the conduct of the examination that triggered the Fifth Amendment, but its use against the defendant at trial to establish an element necessary to obtain a verdict of death. 451 U.S. at 462, 465, 466 (quoting *Culombe v. Connecticut*, 367 U.S. 568, 581-82, 81 S. Ct. 1860, 6 L. Ed. 2d 1037 [1961]) (the Fifth

Amendment requires "'that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips'"). The Court observed that there would have been no Fifth Amendment issue if the psychiatrist's findings had been used solely for the purpose of determining competency. 451 U.S. at 465. But because "the State used [Smith's] own statements, unwittingly made without an awareness that he was assisting the State's efforts to obtain the death penalty[,]" the Fifth Amendment privilege applied. 451 U.S. at 466.

The Court made clear that its ruling applied only to situations in which the defendant "neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence" at trial. 451 U.S. at 468. The Court explained that where a defendant has placed his or her mental state in issue, a court-ordered psychiatric examination may be the only way the State can rebut the defense:

> "Nor was the interview analogous to a sanity examination occasioned by a defendant's plea of not guilty by reason of insanity at the time of his offense. When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case. Accordingly, several Courts of Appeals have held that, under such circumstances, a defendant can be required to submit to a sanity examination conducted by the prosecution's

psychiatrist. [Citations omitted.]" 451 U.S. at 465.

In *Buchanan*, the Court addressed the situation it had distinguished in *Smith*. In *Buchanan*, the defense joined with the prosecution in requesting a court-ordered mental examination of the defendant and presented evidence supporting a mental-state-based defense at trial. The Court held that under those circumstances, allowing the State to use the results of the mental examination for the limited purpose of rebutting that defense did not violate the defendant's Fifth Amendment privilege. 483 U.S. at 423-24.

In addition to the *Smith/Buchanan* line of precedent, Cheever also relies on *Battie v. Estelle*, 655 F.2d 692 (5th Cir. 1981) and *Gibbs v. Frank*, 387 F.3d 268 (3rd Cir. 2004). In *Battie*, the Fifth Circuit Court of Appeals rejected the argument that a defendant waives his or her Fifth Amendment privilege by requesting or submitting to a psychiatric examination to determine sanity at the time of the crime. The court explained that waiver occurs when the defense introduces psychiatric testimony, in the same manner as would the defendant's election to testify at trial. 655 F.2d at 701-02 n. 22. See also *Powell v. Texas*, 492 U.S. 680, 684, 109 S. Ct. 3146, 106 L. Ed. 2d 551 (1989) (stating that the Fifth Circuit's discussion of waiver in *Battie* is supported by *Smith* and *Buchanan*).

We explore *Gibbs* in some depth, because the Third Circuit Court of Appeals examined and applied the *Smith* and *Buchanan* line of precedent to a situation with similarities to Cheever's case.

The defendant in *Gibbs* was tried twice for the 1984 murder of a security guard in Pennsylvania. In the first trial, the defense requested that an expert be appointed for the purpose of determining whether to raise a mental infirmity defense. After the examination, the defense notified the State of its intent to raise such a defense and, consequently, the State secured an order for its own psychiatric examination. The State's psychiatrist gave the defendant *Miranda* warnings, and the defendant made several inculpatory statements. At trial, Gibbs offered expert testimony to establish a diminished capacity defense, and the State called its own expert witness to rebut the testimony. The defendant was found guilty and sentenced to death, but his conviction was ultimately reversed.

At his second trial, the defendant presented an identity defense, not a mental-state-based defense. Nevertheless, the State was permitted to call its expert psychiatric witness to testify about the inculpatory statements the defendant had made during his examination. The defendant was convicted, and the conviction was affirmed on direct appeal. On federal habeas review, the Third Circuit addressed the defendant's claim that his Fifth Amendment privilege was violated when the State was permitted to introduce its psychiatrist's testimony despite the fact that the defendant did not raise the diminished capacity defense at his second trial. 387 F.3d at 271.

The Third Circuit examined and synthesized the Supreme Court's precedent to determine the applicable rules for resolving the issue:

> "If we lay these decisions out, the following landscape emerges. A compelled psychiatric interview implicates Fifth and Sixth Amendment rights (*Smith*). Before submitting to that examination, the defendant must receive Miranda warnings and (once the Sixth Amendment attaches) counsel must be notified (*Smith*). The warnings must advise the defendant of the 'consequences of foregoing' his right to remain silent (*Smith*). The Fifth and Sixth Amendments do not necessarily attach, however, when the defendant himself initiates the psychiatric examination (*Buchanan*, *Penry*). Similarly, the Fifth – but not Sixth – Amendment right can be waived when the defendant initiates a trial defense of mental incapacity or disturbance, even though the defendant had not been given Miranda warnings (*Buchanan*, *Powell*). But that waiver is not limitless; it only allows the prosecution to use the interview to provide rebuttal to the psychiatric defense (*Buchanan*, *Powell*). Finally, the state has no obligation to warn about possible uses of the interview that cannot be foreseen because of future events, such as uncommitted crimes (*Penry*)." 387 F.3d at 274.

Applying this synthesis, the Third Circuit held that while the psychiatrist's testimony was admissible in the first trial at which the defendant had presented a mental capacity defense, it was not admissible at the subsequent trial. The defense had not provided notice of intent to raise a mental capacity defense, the interview was court-ordered and conducted by the State's expert, the defense had not presented

psychiatric testimony at trial, and the report was not used for rebuttal; indeed, the report was not even used for psychiatric purposes. 387 F.3d at 274-75.

Kansas statutes and caselaw are consistent with *Smith*, *Buchanan*, *Battie*, and *Gibbs*. Under K.S.A. 22-3219(1), in order to present a mental disease or defect defense at trial, a criminal defendant must file a pretrial notice of the intent to do so. Filing such a notice is deemed to be consent to a court-ordered mental examination. K.S.A. 22-3219(2) ("A defendant who files a notice of intention to assert [a mental disease or defect defense] thereby submits and consents to abide by such further orders as the court may make requiring the mental examination of the defendant . . . ."). See also *State v. Ji*, 251 Kan. 3, 23, 832 P.2d 1176 (1992) (State was entitled to use court-ordered examination of defendant to rebut defendant's insanity defense, despite the fact the examination was conducted without the benefit of *Miranda* warnings; under K.S.A. 22-3219, the defendant's notice of intent to assert insanity defense was consent to the examination, and the defendant presented evidence supporting insanity defense).

Moreover, although filing a notice of intent under K.S.A. 22-3219(1) constitutes consent to a court-ordered examination, the mere fact the defendant submitted to the examination is not a waiver of the privilege so as to allow the State to use that examination against the defendant at trial. The court-ordered examination remains privileged unless and until the defendant presents evidence supporting a mental disease or defect defense at trial. *Cf. State v.*

Foster, 259 Kan. 198, 910 P.2d 848 (1996); *State v. Williams*, 20 Kan. App. 2d 185, 884 P.2d 755 (1994).

In *Williams*, the defendant filed a notice of intent to raise an insanity defense and then scheduled and paid for a psychiatric examination of the defendant. The State filed a motion to compel discovery of the report, arguing that K.S.A. 22-3219 required its release. The district court ordered the defendant to produce the report. The defendant then withdrew the notice of intent to use the insanity defense and asked the district court to vacate its order. The district court refused, stating the report had to be produced, regardless of whether it was going to be used. Defense counsel refused to comply, arguing that because the notice was withdrawn, the defendant retained his Fifth Amendment privilege in the report. Defense counsel was held in contempt and they appealed.

A panel of the Court of Appeals reversed the contempt order and held that the trial court's *initial order* to produce the report was consistent with K.S.A. 22-3219(2), because the defendant had filed a notice of intent to assert an insanity defense. 20 Kan. App. 2d at 190. After the defendant withdrew his intent to assert an insanity defense, however, the district court's refusal to reconsider its order to produce was erroneous:

> "K.S.A. 1993 Supp. 22-3219(1) *prohibits* admission of any evidence concerning an insanity defense unless a notice of intent to plead insanity has been timely filed or accepted by the court. After appellants withdrew defendant's insanity notice, they became

> estopped from attacking the presumption of sanity surrounding defendant. K.S.A. 1993 Supp. 22-3219 no longer controlled the discovery of defendant's psychiatric report after defendant's notice of intent to plead insanity was withdrawn." *Williams*, 20 Kan. App. 2d at 191.

In *Foster*, 259 Kan. 198, the defendant argued that the prosecutor committed misconduct by cross-examining him about statements he made during a psychological evaluation to determine sanity. The defendant had filed a notice of intent to assert an insanity defense, but the defendant's psychologist had not testified at the time the prosecutor asked the question. Citing *Williams*, this court held that the defendant's conversations with the psychologist remained privileged until the psychologist testified. 259 Kan. at 210 (citing *Williams*, 20 Kan. App. 2d at 191).

We note that the defendant's objection at trial and the trial court's ruling in *Foster* were based upon the psychologist-client privilege, not the Fifth Amendment privilege and that our analysis in *Foster* does not mention the Fifth Amendment. Nevertheless, our cite to *Williams* for the proposition that the defendant's conversations with the psychologist remained privileged suggests that we recognized the situation implicated the Fifth Amendment privilege.

In summary, we hold that K.S.A. 22-3219 and our caselaw are in harmony with the scope of the Fifth Amendment privilege as construed in the *Smith* and *Buchanan* line of precedent. Read together, the following rules apply.

Where a defendant files a notice of intent to assert a mental disease or defect defense under K.S.A. 22-3219, the Fifth Amendment does not prevent the court from ordering the defendant to submit to a mental examination. *Buchanan*, 483 U.S. at 423-24; *Smith*, 451 U.S. at 465. The filing of such a notice constitutes consent to a court-ordered mental examination by an expert for the State, making *Miranda* warnings unnecessary. K.S.A. 22-3219(2); *Ji*, 251 Kan. at 23. Consent to the examination, however, does not waive the defendant's Fifth Amendment privilege so as to entitle the State to use the examination against the defendant at trial. Waiver does not occur unless or until the defendant presents evidence at trial that he or she lacked the requisite criminal intent due to a mental disease or defect. *Cf. Foster*, 259 Kan. at 210; *Williams*, 20 Kan. App. 2d at 191. See also *Battie*, 655 F.2d at 702 (submitting to examination does not waive the privilege, waiver occurs when the defendant presents mental-state defense at trial). If the defendant withdraws the notice to assert a mental disease or defect defense or does not present evidence supporting that defense at trial, the Fifth Amendment privilege remains intact and the State may not use the mental examination as evidence against the defendant. *Foster*, 259 Kan. at 210; *Williams*, 20 Kan. App. 2d at 191 (defense withdrew notice of intent to assert insanity defense). If, however, the defendant presents evidence supporting a mental disease or defect defense, the State may use the court-ordered examination for the limited purpose of rebutting the defendant's mental disease or defect defense. 483 U.S. at 423-24.

Applying these rules to Cheever's case, Cheever retained a Fifth Amendment privilege in the Welner examination. Cheever could waive his privilege and allow use of the report under the proper circumstances. Absent such a waiver, however, the report was privileged under the Fifth Amendment.

1. *Did Cheever waive the privilege, thus entitling the State to use the examination for rebuttal?*

The State contends that Cheever presented expert testimony at trial regarding his mental state, and therefore it was entitled to use the examination to rebut that defense. Cheever contends that he did not present evidence of a mental disease or defect defense. Cheever argues his evidence was limited to showing voluntary intoxication, which is not a mental disease or defect under Kansas law and, therefore, the State was not entitled to use the examination for rebuttal.

The only mental capacity defense recognized in Kansas is the mental disease or defect defense, as defined by K.S.A. 22-3220:

> "It is a defense to a prosecution under any statute that the defendant, as a result of mental disease or defect, lacked the mental state required as an element of the offense charged. Mental disease or defect is not otherwise a defense." (Amended L. 2010, ch. 136, sec. 20; now K.S.A. 2011 Supp. 21-5209).

It is well established that voluntary-intoxication-induced temporary mental incapacity at the time of the crime is not evidence of a mental

disease or defect. *Kleypas*, 272 Kan. 894, Syl. ¶ 1; *In re Habeas Corpus Petition of Mason*, 245 Kan. 111, 113, 775 P.2d 179 (1989). Evidence of permanent mental incapacity due to long-term use of intoxicants, however, may support a mental disease or defect defense. *Petition of Mason*, 245 Kan. at 114.

In *Kleypas*, the defendant attempted to introduce expert witness testimony that he had experienced a blackout at the time of the offenses due to voluntary intoxication and chronic cocaine use. The State objected that the defendant was attempting an end run around the procedural and substantive consequences of asserting a mental defect defense after having withdrawn his previously filed notice of intent to assert such a defense. The trial court agreed. On appeal, we held that the defendant's expert testimony did not relate to a mental disease or defect but solely to voluntary intoxication, and thus the trial court erred in refusing to allow the defendant to present that evidence. 272 Kan. at 921.

Our *Kleypas* decision was based on *Petition of Mason*, 245 Kan. 111. In *Mason*, the trial court ordered a mistrial after defense counsel told the jury during opening statement that the defense would present evidence that the defendant was in an alcohol-induced blackout at the time of the offense, due, in part, to long-term alcohol abuse. The trial court found that the evidence described would constitute evidence of insanity, not voluntary intoxication, and thus ordered a mistrial because the defendant had not filed notice of an insanity defense. 245 Kan. at 113.We reversed, holding that evidence of *temporary* mental incapacity caused by voluntary intoxication is not evidence of

insanity. 245 Kan. at 113 (discussing *State v. Seely*, 212 Kan. 195, 510 P.2d 115 [1973]). We noted we had previously held that evidence that continued use of intoxicants had caused "*permanent* mental deterioration or disease" may constitute insanity. *Petition of Mason*, 245 Kan. at 114 (discussing *State v. James*, 223 Kan. 107, 574 P.2d 181 [1977]). But because the defendant was not claiming that his alcohol-induced blackout at the time of the crime was "anything . . . other than temporary," the trial court erred in finding that the evidence described in the defendant's opening statement would be evidence of insanity, rather than voluntary intoxication. 245 Kan. at 113.

Cheever's voluntary intoxication defense was based on evidence that his mental state at the time of the crime was a product of a combination of immediate voluntary ingestion of methamphetamine and long-term use of the drug. Cheever did not present evidence, however, that his use of methamphetamine had caused permanent mental impairment. Evans testified that while neurotoxic changes could potentially be permanent, in most cases, those changes abate after a 4- to 6-month period of nonuse. Evans did not testify that Cheever had sustained permanent damage. In fact, he testified that psychological testing done on Cheever some 6 months after his arrest was unlikely to be useful for determining his mental state at the time of the crime because he would no longer have been suffering the effects of the drug.

Accordingly, we find that Cheever's evidence showed only that he suffered from a temporary mental incapacity due to voluntary intoxication; it was not

evidence of a mental disease or defect within the meaning of K.S.A. 22-3220. Consequently, Cheever did not waive his Fifth Amendment privilege and thus permit his court-ordered examination by Dr. Welner to be used against him at trial. Therefore, we conclude that allowing Welner to testify in rebuttal to the voluntary intoxication defense violated Cheever's constitutional rights under the Fifth and Fourteenth Amendments to the United States Constitution.

2. *Impeachment*

Cheever also argues that allowing the State to use statements he made to Welner to impeach his testimony at trial violated his Fifth Amendment privilege. The State contends that because there is no evidence Cheever's statements to Welner were unlawfully coerced and Cheever does not make such a claim, there was no reason to exclude that evidence. In its brief, the State argues:

> "Whether viewed as a constitutional claim or otherwise, there is no basis for exclusion of Dr. Welner's testimony. The exclusion of relevant evidence obtained by the State in a criminal prosecution is a judicially created remedy designed to safeguard the rights of defendants through its deterrent effect. *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 371, 118 S. Ct. 2014, 141 L. Ed. 2d 344 (1998). The 'primary purpose of the exclusionary rule "is to deter future unlawful police conduct."' When there is no government misconduct, there is no basis for applying the exclusionary rule. Because there was no allegation of government

misconduct here, the exclusion of Dr. Welner's testimony by the trial court was not warranted."

At oral argument, Cheever noted the State's argument appeared to be based on the rationale of *Harris v. New York*, 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971) (defendant's statements, inadmissible in prosecution's case-in-chief as a sanction for failing to provide *Miranda* warnings, may be used to impeach defendant's testimony at trial; the benefits of allowing the prosecution to use the truth-testing device of impeachment outweigh the minimal deterrent value of excluding tainted evidence for all purposes).

We hold the exclusionary rule argument has no relevance here. Cheever's statements to Welner are not excluded as a sanction for governmental misconduct; they are inadmissible because they are protected by the Fifth Amendment privilege against compelled self-incrimination. *Cf. Kansas v. Ventris*, 556 U.S. 586, 129 S. Ct. 1841, 173 L. Ed. 2d 801 (2009) (evidence protected by Fifth Amendment privilege is inadmissible to prevent violation of the substantive protection of the Fifth Amendment privilege; evidence inadmissible under the exclusionary rule is excluded as a sanction for a constitutional violation that has already occurred).

Although not argued by the parties, we note there is conflicting federal caselaw on the question of whether a defendant's statements made during a court-ordered mental examination, while not admissible to rebut a mental-state defense, may nevertheless be used to impeach the defendant's trial testimony. Compare *United States v. Leonard*, 609 F.2d

1163 (5th Cir. 1980) (construing Fed. R. Crim. Proc. 12.2[c]; defendant's statements during a court-ordered mental examination are admissible *solely* on the issue of sanity and may not be used for impeachment); and *United States v. Castenada*, 555 F.2d 605 (7th Cir. 1977) (holding that statements made during court-ordered mental examination under 18 U.S.C. § 4244 (1976) that are inadmissible on the issue of guilt, are admissible for impeachment because they go to credibility, not guilt).

We recognize there are compelling, but conflicting, policy rationales for the competing positions. On one hand, prohibiting use for impeachment promotes the candid conversation with the expert that is necessary to produce reliable psychiatric testimony for the government or defendant, as the case may be. 609 F.2d at 1165-66. On the other hand, allowing impeachment of a testifying defendant's inconsistent testimony "protect[s] the integrity of the fact-finding process" by preventing a defendant from "'pervert[ing]'" the shield provided by the statute "'into a license to use perjury by way of defense, free from the risk of confrontation with prior inconsistent utterances.'" *Castenada*, 555 F.2d at 610 (quoting *Harris v. New York*, 401 U.S. 222, 226, 91 S. Ct. 643, 28 L. Ed. 2d 1 [1971]).

We conclude that under the circumstances, resolution of this issue must await another day. The important considerations that underlie this issue have not been appropriately raised, briefed, and argued. In addition, as discussed below, the erroneous admission of Welner's testimony requires reversal and remand of the capital murder and attempted capital murder convictions. Thus, even if we were also to determine

that Cheever's statements were properly admitted for impeachment, that determination would not change the outcome in this case.

Last, we address an additional point about the admissibility of Welner's testimony. The trial court suggested that Welner's testimony was admissible for rebuttal because Evans relied on Welner's report in reaching his conclusions. During the arguments over Cheever's objection to the State calling Welner to testify in rebuttal to Evans, the State interjected that Evans had testified he relied on Welner's report. Defense counsel confirmed the State's representation. The trial court then stated "that fact standing alone probably allows the State to call him to give his own point of view."

Although defense counsel confirmed the State's representation, the record does not. Evans never stated that he relied upon Welner's report. Evans specifically testified that he did not watch the video of Welner's interview or read the transcript of the interview. The only reference he made to Welner's report is in an exchange between the State and Evans, in which the State commented: "That's what he [Cheever] told Dr. Welner. I guess if you'd read that interview, you'd know that." Evans responded: "I don't remember that piece of Mr. Welner's report."

The trial court did not provide a legal basis for its statement that Evans' reliance on Welner's report supported allowing Welner to testify in rebuttal. Cheever identifies it as a hearsay ruling and focuses his argument on his contention that Evans did not rely on Welner's report. In any event, we need not speculate

about the legal basis for the trial court's suggestion that Evans' reliance upon Welner's report provided an alternate ground for allowing Welner to testify, because the record plainly fails to establish that Evans actually did rely upon Welner's report to arrive at his own opinions.

C. *Harmless Error Analysis*

Because the admission of Welner's testimony violated Cheever's Fifth Amendment privilege against compelled self-incrimination, we apply the federal constitutional harmless error test of *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705, *reh. denied* 386 U.S. 987 (1967). Under *Chapman*, an error that violates a criminal defendant's constitutional rights requires reversal unless the party who benefitted from the error – here, the State – "proves beyond a reasonable doubt that the error complained of . . . did not affect the outcome of the trial in light of the entire record, *i.e.*, proves there is no reasonable possibility that the error affected the verdict." *State v. Ward*, 292 Kan. 541, 569, 256 P.3d 801 (2011), *cert. denied* 132 S. Ct. 1594 (2012); *Kleypas*, 272 Kan. at 1084 (State must prove beyond a reasonable doubt that federal constitutional error did not contribute to the verdict obtained).

In *Satterwhite v. Texas*, 486 U.S. 249, 258, 108 S. Ct. 1792, 100 L. Ed. 2d 284 (1988), the United States Supreme Court considered whether the erroneous admission of the defendant's court-ordered psychiatric examination was harmless error under *Chapman*. Because of parallels with Cheever's case, we set out in

detail the Court's discussion of the evidence at issue and its effect on the outcome:

> "Dr. Grigson [who conducted the examination of the defendant] was the State's final witness. His testimony stands out both because of his qualifications as a medical doctor specializing in psychiatry and because of the powerful content of his message. Dr. Grigson was the only licensed physician to take the stand. He informed the jury of his educational background and experience, which included teaching psychiatry at a Dallas medical school and practicing psychiatry for over 12 years. He stated unequivocably [*sic*] that, in his expert opinion, Satterwhite 'will present a continuing threat to society by continuing acts of violence.' He explained that Satterwhite has 'a lack of conscience' and is 'as severe a sociopath as you can be.' To illustrate his point, he testified that on a scale of 1 to 10 – where 'ones' are mild sociopaths and 'tens' are individuals with complete disregard for human life – Satterwhite is a 'ten plus.' Dr. Grigson concluded his testimony on direct examination with perhaps his most devastating opinion of all: he told the jury that Satterwhite was beyond the reach of psychiatric rehabilitation.
>
> "The District Attorney highlighted Dr. Grigson's credentials and conclusions in his closing argument:
>
> > 'Doctor James Grigson, Dallas psychiatrist and medical doctor. And he

> tells you that on a range from 1 to 10 he's ten plus. Severe sociopath. Extremely dangerous. A continuing threat to our society. Can it be cured? Well, it's not a disease. It's not an illness. That's his personality. That's John T. Satterwhite.'
>
> "The finding of future dangerousness was critical to the death sentence. Dr. Grigson was the only psychiatrist to testify on this issue, and the prosecution placed significant weight on his powerful and unequivocal testimony. Having reviewed the evidence in this case, we find it impossible to say beyond a reasonable doubt that Dr. Grigson's expert testimony on the issue of Satterwhite's future dangerousness did not influence the sentencing jury." 486 U.S. at 259-60.

Satterwhite involved the admission of evidence in the penalty phase of a capital murder proceeding, while here, Welner's testimony was admitted in the guilt stage. As the Court recognized in *Satterwhite*, assessing the prejudicial effect of error in the sentencing phase can be more difficult because of the discretion the jury has in determining whether death is the appropriate punishment. 486 U.S. at 258. That difference notwithstanding, we find the Court's analysis of the prejudicial effect of the error in admitting psychiatric evidence instructive for the ways in which it parallels Cheever's case.

As with Grigson's testimony in *Satterwhite*, Welner's "testimony stands out both because of his qualifications . . . and because of the powerful content

of his message." 486 U.S. at 259. Welner's background and qualifications were significantly more impressive than Evans'. Welner testified about his board certifications in psychiatry, forensic psychiatry, and advanced clinical psychopharmacology. His experience included private practice and teaching, both as an associate professor of psychiatry at New York University School of Medicine and as an adjunct professor of law at Duquesne University School of Law at the University of Pittsburgh. He testified at length about his background, including an American Psychiatric Association award, keynote speaking engagements, research work, publications, and testimony before state legislatures on psychiatry and the law.

Evans' credentials were simply not on the same level – a point the State highlighted during its cross-examination of Evans. Through its questions, the State obtained Evans' acknowledgment that he was not a medical doctor or a psychiatrist.

The content of Welner's testimony also stands out. Welner was the last witness the jury heard during the guilt phase of the trial, and his testimony was extensive and devastating. He employed a method of testifying that virtually put words into Cheever's mouth. He focused on the events surrounding the shootings, giving a moment-by-moment recounting of Cheever's observations and actual thoughts to rebut the sole defense theory that he did not premeditate the crimes. He characterized Cheever as a person who had chosen an antisocial outlaw life style and who was indifferent to the violence he had committed. *Cf. State v. Vandeweaghe*, 351 N. J. Super. 467, 799 A.2d 1

(2002), *aff'd* 177 N.J. 229, 827 A.2d 1028 (2003) (Welner's testimony that defendant had antisocial personality disorder and was a liar, presented in rebuttal to intoxication defense, was highly prejudicial plain error, requiring reversal).

Arguably, it is possible the jury might have convicted Cheever even without Welner's testimony; however, that is not the standard we must apply under *Chapman*. "The question . . . is not whether the legally admitted evidence was sufficient to support" the verdict, "but, rather, whether the State has proved 'beyond a reasonable doubt that the error complained of *did not* contribute to the verdict obtained.'" *Satterwhite*, 486 U.S. at 258-59 (quoting *Chapman*, 386 U.S. at 24).

Because this error violated Cheever's federal constitutional rights, we must reverse unless we can say with "the highest level of certainty that the error did not affect the outcome." *Ward*, 292 Kan. at 564. After reviewing the entire record, we do not have that level of certainty; we cannot conclude beyond a reasonable doubt that Welner's testimony did not contribute to the verdict in this case. Consequently, the error is not harmless, and Cheever's convictions for capital murder and attempted capital murder must be reversed and remanded for a new trial.

Our decision reversing Cheever's convictions for capital murder and attempted capital murder make it unnecessary to resolve the other issues Cheever has raised. Nevertheless, because we are remanding the case for a new trial, we will address those issues that are likely to arise on remand in order to provide

guidance to the trial court. *State v. Scott*, 280 Kan. 54, 107, 183 P.3d 801 (2008); *Kleypas*, 272 Kan. at 1057.

II. FELONY MURDER AS A LESSER INCLUDED OFFENSE OF CAPITAL MURDER

The trial court instructed the jury on first-degree premeditated murder as a lesser included offense of capital murder. On appeal, Cheever argues that the first-degree murder instruction should have included the alternative theory of felony murder as a lesser included offense of capital murder. Cheever acknowledges he did not request such an instruction or object to its absence in the district court; thus the trial judge did not have an opportunity to address this issue.

Cheever argues that capital murder and first-degree murder are different degrees of the crime of homicide under K.S.A. 21-3107(2)(a); therefore, first-degree murder, which includes felony murder, is a lesser included crime of capital murder. We agree.

K.S.A. 21-3107(2) sets out the definition of lesser included crimes:

> "(2) . . . A lesser included crime is:
> (a) A lesser degree of the same crime;
> (b) a crime where all elements of the lesser crime are identical to some of the elements of the crime charged;
> (c) an attempt to commit the crime charged; or
> (d) an attempt to commit a crime defined under subsection (2)(a) or (2)(b)."

Kansas has long-recognized that the generic crime of homicide, "'of which murder is the highest and most criminal species, is of various degrees, according to circumstances. The term . . . is generic, embracing every mode by which the life of one man is taken by the act of another.'" *State v. Gregory*, 218 Kan. 180, 182-83, 542 P.2d 1051 (1975) (citing *State v. Ireland*, 72 Kan. 265, 270, 83 Pac. 1036 [1905] [quoting *Commonwealth v. Webster*, 59 Mass. 295, 1850 WL 2988 [1850]). Thus, in *Gregory*, we held that involuntary manslaughter is a lesser degree of second-degree murder and is therefore a lesser included crime under K.S.A. 21-3107(2)(a). We explained that while it appears murder and manslaughter are different crimes, "'they involve but one crime and are only degrees of felonious homicide.'" 218 Kan. at 183 (quoting Warren on Homicide, § 83, p. 415-16).

To date, our caselaw has recognized the following homicide degree crimes, in descending order: first-degree murder, second-degree murder, voluntary manslaughter, and involuntary manslaughter. See *State v. Garcia*, 272 Kan. 140, 150, 32 P.3d 188 (2001), *disapproved on other grounds by State v. Schoonover*, 281 Kan. 453, 133 P.3d 48 (2006). Before the capital murder statute was enacted in 1994, first-degree murder was recognized as the highest degree of our homicide crimes. See *State v. Bradford*, 219 Kan. 336, 343, 548 P.2d 812 (1976) ("First-degree murder, whether felony murder or not, is the highest degree of homicide."). We have not had occasion to consider whether capital murder is part of the homicide-degree-crime structure for purposes of K.S.A. 21-3107(2)(a).

Capital murder is first-degree murder, with "one or more specific elements beyond intentional premeditated murder" that function as part of the constitutionally required narrowing process. *Marsh*, 548 U.S. at 175-76. It logically follows, and we hold, that capital murder is now the highest degree of homicide in Kansas.

With capital murder as the highest degree of homicide, first-degree murder is a lesser degree of capital murder under K.S.A. 21-3107(2)(a) and is therefore a lesser included crime of capital murder. The crime of first-degree murder may be committed in two ways: premeditated murder and felony murder. See *State v. Hoge*, 276 Kan. 801, 810, 80 P.3d 52 (2003) (premeditated murder and felony murder are alternate means of committing the same crime and are not separate and distinct crimes); *State v. McKinney*, 265 Kan. 104, 110, 961 P.2d 1 (1998) ("Felony murder is not a lesser degree of murder than premeditated murder. Felony murder is first-degree murder; premeditated murder is first-degree murder."). Accordingly, felony murder is a lesser included crime of capital murder and, where facts support it, should be included in instructions on lesser included crimes in capital murder cases.

We note that K.S.A. 21-3107 has been amended recently to eliminate lesser degrees of the crime of felony murder. See K.S.A. 2011 Supp. 21-5109(b)(1), as amended by L. 2012, ch. 157, sec. 2 (A lesser included crime is "[a] lesser degree of the same crime, except that there are no lesser degrees of murder in the first degree under subsection [a][2] [felony murder] of K.S.A. 2011 Supp. 21-5402"). This amendment has no bearing

on our analysis. The issue at hand concerns whether felony murder is a lesser degree of the crime of capital murder, not whether some other offense is a lesser degree of felony murder.

III. VOIR DIRE COMMENTS MENTIONING APPELLATE REVIEW

The trial court divided the prospective jurors into seven panels for voir dire. The trial court's introductory remarks to each panel were substantially similar and began by introducing the parties, their counsel, and court personnel, including the court reporter. In explaining the role of the court reporter, the trial court told the prospective jurors that the court reporter's written record of the proceedings served two purposes: for reference during the trial and for appellate review should the case be appealed.

The following remarks made to the seventh panel are representative of those made to all of the panels:

> "Almost everything is on the record that we do in here.
>
> "We refer back to that record from time to time during the trial to see what someone said, whether a question's already been asked, things of that nature, and if this case should go up on appeal to the appellate courts in Kansas in Topeka, a transcript is made of everything we do and that transcript is sent to the appellate court, along with the exhibits, and the appellate court decides all issues on appeal based on that record that we've made here in the trial court."

Cheever argues that the trial court's remarks violated the Eighth Amendment to the United States Constitution as applied in *Caldwell v. Mississippi*, 472 U.S. 320, 328-29, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985) (holding that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere"). Cheever contends the trial judge's remarks in this case created the risk that the jurors would believe that the ultimate responsibility for Cheever's sentence rested with the appellate courts, thereby undermining the heightened reliability the Eighth Amendment demands of a jury's determination that death is the appropriate punishment.

In *Caldwell*, the prosecutor argued to the jury that a decision to impose the death sentence would not be final because it was subject to review by the appellate court. The Supreme Court held the remarks rendered the death sentence unconstitutional. The Court explained that remarks that "[seek] to minimize the jury's sense of responsibility for determining the appropriateness of death" undermine the reliability of the jury's death sentence in violation of the Eighth Amendment. 472 U.S. at 341. See also *Romano v. Oklahoma*, 512 U.S. 1, 9, 114 S. Ct. 2004, 129 L. Ed. 2d 1 (1994) (*Caldwell* is "'relevant only to certain types of comment – those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision.'") (quoting *Darden v. Wainwright*, 477 U.S. 168, 183 n.15, 106 S. Ct. 2464, 91 L. Ed. 2d 144 [1986]).

State v. Nguyen, 251 Kan. 69, 833 P.2d 937 (1992), provided this court with an opportunity to consider whether a trial judge commits judicial misconduct by mentioning to a jury the possibility that the case before it could be appealed. In explaining the process for the jury to submit questions or request readbacks during deliberations, the judge said:

> "'I explained to you that if I get a question, and that will be through my bailiff, Ms. Mies, the foreman will write it down and date it. And I would request also that he write the time – he or she write the time on there. That question will be preserved, 'cause defense, regardless, would have a right to appeal. As I told you, that a judge is under a microscope and that [to] be sure that any defendant receives the correct legal decisions. I can be challenged. And I welcome the challenges.'" 251 Kan. at 78-79.

The defendant argued that mentioning the right to appeal was improper because the remarks "lessened the jury's sense of responsibility in the correctness of its decision and the jury's belief in the importance of its decision[,] . . . might have given the jurors the impression that a mistake in their findings of fact also would be correctable by appeal[, and]. . . created the impression the court believed he was guilty." 251 Kan. at 79. Although we found the comments were not prejudicial, we unequivocally stressed that "[a] trial court should not mention a defendant's right to appeal." 251 Kan. at 80.

Nguyen was not a death penalty case; however, the reasoning is consistent with *Caldwell*. Accordingly, we

take this opportunity to reiterate our general directive: It is improper for a trial court to make comments to the jury regarding appellate review. Moreover, we emphasize that the life-or-death stakes in a capital murder proceeding require extra vigilance on the part of the trial court to abide by this directive. We note the remarks in this case are not analogous to those that required reversal in *Caldwell*. Nevertheless, under *Nguyen*, it is error for the trial judge to tell jurors, even prospective jurors, that the exhibits and transcripts of the proceedings will be reviewed by an appellate court. Whether that error would be held to be prejudicial depends on the specific circumstances of the particular case; however, because it is error that is entirely within the judge's power to avoid, it should be avoided.

IV. CHEEVER'S AGE AT THE TIME OF THE OFFENSE

Cheever argues that his death sentence was imposed in violation of his right to jury trial under the Sixth and Fourteenth Amendments to the United States Constitution because the jury did not find beyond a reasonable doubt that he was at least 18 years old at the time of the crime, a fact that he contends is necessary to render him eligible for the enhanced sentence of death. Cheever does not dispute that he was at least 18 years old at the time of the capital offense.

The Sixth Amendment right to jury trial requires that any fact, other than a prior conviction, "that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New*

Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). In *Ring v. Arizona*, 536 U.S. 584, 609, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), the Court extended the holding of *Apprendi* to capital sentencing proceedings. There, the Court held that Arizona's sentencing scheme violated the Sixth Amendment right to jury trial because it permitted a judge to find the existence of statutory aggravating factors necessary to impose the death penalty. 536 U.S. at 609 (overruling *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 [1990]). Under *Ring*, all facts necessary for imposition of the death penalty must be found by a jury beyond a reasonable doubt. 536 U.S. at 602, 609.

Resolution of this issue therefore hinges on whether the fact Cheever was at least 18 years of age at the time of the crime is a fact necessary for imposition of the death penalty. Cheever argues that it is, relying primarily on *Roper v. Simmons*, 543 U.S. 551, 578, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) ("The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed."). Cheever points out that *Roper* held that being 18 years or older at the time of the offense is an *eligibility requirement* for the death penalty. 543 U.S. at 574 (18 is "the age at which the line for death eligibility ought to rest"). Moreover, he notes, the Court specifically rejected the suggestion that youth should be considered as a mitigating factor on a case-by-case basis and instead "[drew] the line at 18 years of age" as a "categorical rule[]." 543 U.S. at 574.

Cheever also points to K.S.A. 21-4622 of our capital sentencing statutes. That statute provides:

> "Upon conviction of a defendant of capital murder and a finding that the defendant was less than 18 years of age at the time of the commission thereof, the court shall sentence the defendant as otherwise provided by law, and no sentence of death or life without the possibility of parole shall be imposed hereunder."

Cheever contends that under this statute, it is a prerequisite to the imposition of the death penalty that the defendant be 18 years of age or older at the time the capital murder offense was committed.

Cheever also cites our Jessica's Law cases. In them, we addressed the question of age as an element of the offenses designated for enhanced sentencing under K.S.A. 21-4643 (requiring life sentence with mandatory minimum of 25 years for a defendant convicted of specified offenses and who was at least 18 years old at the time of the offense). Applying *Apprendi*, we have held that when a defendant is charged with the more serious off-grid version of the crime subject to enhanced sentencing, the defendant's age at the time of the offense is a fact that must be submitted to the jury and proved beyond a reasonable doubt. See *State v. Gonzales*, 289 Kan. 351, Syl. ¶ 11, 212 P.3d 215 (2009); *State v. Bello*, 289 Kan. 191, Syl. ¶ 4, 211 P.3d 139 (2009); *State v. Morningstar*, 289 Kan. 488, 495, 213 P.3d 1045 (2009); *State v. Reyna*, 290 Kan. 666, 676, 234 P.3d 761 (2010).

Tying these together, Cheever argues that because the death penalty cannot be imposed unless the defendant was at least 18 years old at the time the crime of capital murder was committed, the defendant's age is a fact necessary to the imposition of a death sentence, just as a defendant's age at the time of the offense is a fact necessary to the imposition of the enhanced sentencing provision of Jessica's Law. Therefore, the Sixth Amendment requires that the fact that he was at least 18 years old at the time of the crime be submitted to and found by a jury beyond a reasonable doubt.

The State responds that the defendant's age is not within the scope of *Apprendi* because it is not a fact that increases the statutory maximum sentence. According to the State, death is the maximum authorized sentence under our capital sentencing statutes, with the defendant's age merely a fact that mitigates that sentence to life in prison. The State cites K.S.A. 21-4622, which provides that upon a finding that the defendant was "less than" age 18, the defendant shall not be sentenced to death. The State argues that because the finding as to the defendant's age does not increase the severity of the maximum sentence, it is not a fact that must be found by a jury beyond a reasonable doubt.

We deem the State's arguments unpersuasive. First, we disagree that death is the maximum authorized sentence. The statutory maximum penalty for Sixth Amendment purposes is determined by the facts reflected by the jury's verdict. *Ring*, 536 U.S. at 602 (the Sixth Amendment prohibits exposing a defendant "'to a penalty exceeding the maximum he would receive

if punished according to the facts reflected in the jury verdict alone.'" Under K.S.A. 21-4624(e), life in prison without parole – not death – is the maximum sentence that can be imposed based *solely* on a jury's verdict finding a defendant guilty of capital murder. K.S.A. 21-4624(e) ("the defendant shall be sentenced to life without the possibility of parole" *unless* "by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the [statutory] aggravating circumstances . . . exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist").

Second, the Supreme Court in *Roper* explicitly rejected the idea that the Eighth Amendment could be satisfied by treating the defendant's youth as a mitigating circumstance. Instead, the Court drew a bright line, holding that the age of 18 or older is a requirement for death eligibility. 543 U.S. at 574.

Third, under our statutory scheme, the fact the defendant was at least 18 is a prerequisite to imposition of the death penalty. Although K.S.A. 21-4622 refers to a finding that the defendant was *under* age 18, it is clear that a capital sentencing proceeding *does not even occur* if a defendant is found to be less than 18 years of age at the time of the commission of the capital murder. See K.S.A. 21-4624(b) ("*Except as provided in K.S.A. 21-4622* . . . upon conviction of a defendant of capital murder, the court, upon motion of the county or district attorney, shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death." [Emphasis added.])

Accordingly, we conclude that the fact the defendant was at least 18 years old at the time of the crime is a fact necessary to subject the defendant to the death penalty and therefore within the scope of Sixth Amendment protection.

Because we are addressing this issue only for guidance on remand, we need not address Cheever's arguments that the same conclusion is dictated by our Jessica's Law jurisprudence. We hold only that it is required by *Ring* and *Roper*. Similarly, we need not decide whether the failure to instruct the jury to find the defendant's age was harmless under the facts of this case. See *State v. Colston*, 290 Kan. 952, 975, 235 P.3d 1234 (2010) (citing *Reyna*, 290 Kan. 666, Syl. ¶ 10) (harmless error analysis applies to error in omitting element of defendant's age where age was uncontested and supported by overwhelming evidence).

Additionally, we decline to address, and express no opinion on, whether the lack of a jury finding that Cheever was at least 18 years of age at the time of the crime is a determination on the sufficiency of the evidence for purposes of double jeopardy. *Cf. State v. Hernandez*, 294 Kan. 200, 209-10, 273 P.3d 774, 780 (2012) (declining to address whether an *Apprendi* error in a noncapital case is equivalent to a determination that the evidence was insufficient to support the conviction for double jeopardy purposes when the issue was not raised, briefed, or argued on appeal). As we noted in *Hernandez*, the parties are free to raise such an issue on remand. 294 Kan. at 211.

V. PENALTY-PHASE INSTRUCTIONS ON MITIGATING CIRCUMSTANCES

State v. Kleypas contained the following directive concerning instruction of juries on mitigating circumstances in death penalty cases:

> "[A]ny instruction dealing with the consideration of mitigating circumstances should state (1) they need to be proved only to the satisfaction of the individual juror in the juror's sentencing decision and not beyond a reasonable doubt and (2) mitigating circumstances do not need to be found by all members of the jury in order to be considered in an individual juror's sentencing decision." 272 Kan. 894, 1078, 40 P.3d 139 (2001).

The penalty-stage jury instructions in this case did not state that mitigating circumstances need not be proved beyond a reasonable doubt. Cheever argues that as a result, the instructions did not conform to Kansas law.

We note that the instruction at issue followed PIK Crim. 3d 56.00-D (2003 Supp.). That pattern instruction did not conform to our directive in *Kleypas*. In 2008, PIK Crim. 3d 56.00-D was amended to inform the jury that mitigating circumstances do not need to be proved beyond a reasonable doubt. In any retrial of this case, the most current version of the PIK Crim. 3d instructions on mitigating evidence should be used.

VI. MERCY INSTRUCTION

Cheever challenges the mitigating circumstances instruction on another ground, specifically, the following part:

> "Mitigating circumstances are those which in fairness may be considered as extenuating or reducing the degree of moral culpability or blame or which justify a sentence of less than death, even though they do not justify or excuse the offense.
>
> "The appropriateness of exercising mercy can itself be a mitigating factor in determining whether the State has proved beyond a reasonable doubt that the death penalty should be imposed."

Cheever argues that by characterizing mercy as a mitigating circumstance and placing it in the context of the weighing equation, the instruction prevents the jurors from being able to give full effect to mercy as a basis for a sentence less than death, in violation of the Eighth Amendment. Cheever argues that the jurors must be allowed the opportunity to extend mercy and impose a life sentence *after* determining that the mitigators do not outweigh the aggravators and death is the appropriate sentence by law. He suggests the following language would properly allow jurors who choose to exercise mercy to give effect to that decision:

> "Whether or not the mitigating circumstances outweigh the aggravating circumstances, you

> may recommend mercy for the Defendant and sentence him to life imprisonment."

This same argument was made and rejected in *Kleypas*:

> "Kleypas argues that while the instruction introduces the concept of exercising mercy to the jury, it does so in a legally insufficient manner. Kleypas argues that mercy, if it is to be exercised, must be exercised only after the jury has weighed aggravating and mitigating circumstances and determined that a sentence of death is warranted. According to Kleypas, only *after* the jury has decided that Kleypas should be put to death can it truly exercise mercy and instead impose a nondeath sentence, thus mercy itself should not be characterized as a mitigator." 272 Kan. at 1035-36.

We found the argument was not persuasive. First, we held the defendant was not entitled to a mercy instruction under federal or state law:

> "[T]he United States Supreme Court has held that the Eighth Amendment requires two things of a death sentence: (1) The sentencer must not have unbridled discretion in determining the fate of the defendant, and (2) the defendant must be allowed to introduce any relevant mitigating evidence of his character or record or circumstances of the offense. *California v. Brown*, 479 U.S. 538, 541, 107 S. Ct. 837, 93 L. Ed. 2d 934 (1987). A mercy instruction per se is simply not required as part of this equation by

> federal or state law, nor is a specific type of mercy instruction." 272 Kan. at 1036.

Second, we held that the instruction, as given, properly and adequately informed the jury of the role of mercy in the weighing process. 272 Kan. at 1036.

Cheever argues, however, that the United States Supreme Court's decision in *Marsh*, 548 U.S. 163, provides grounds for reconsideration of that holding in *Kleypas*. According to Cheever, the Court's interpretation of the weighing process as *the decision* for life or death and its recognition that Kansas' mercy instruction "'eliminate[s] the risk that a death sentence will be imposed in spite of facts calling for a lesser penalty,'" provides new support for his argument. Neither party mentions that in *Scott*, we addressed and rejected this argument, concluding that nothing in *Marsh* required such an instruction:

> "We do not find Scott's arguments to support additional instructions persuasive. *Kansas v. Marsh* cannot be read to require an additional step beyond weighing. In fact, the United States Supreme Court specifically reasoned a decision that the aggravating and mitigating factors are in equipoise is a decision supporting imposition of the death penalty[.]" 286 Kan. at 98.

Cheever's argument is the same argument we considered and rejected in *Kleypas*, and his further argument that the *Marsh* decision justifies a different conclusion was resolved against him by our decision in *Scott*. Cheever offers nothing new to support revisiting the decisions in those cases.

VII. PROSECUTORIAL MISCONDUCT DURING PENALTY STAGE

Cheever contends that certain comments concerning consideration of mitigating circumstances made by the prosecutor during the penalty-stage closing argument constitute prosecutorial misconduct.

The first comment at issue was made during the State's closing argument rebuttal:

> "Ladies and gentlemen, let's start off by looking at these mitigating circumstances offered to you by the defendant, which Judge Ward has contained in the instructions. First of all, it's important to remember that these are contentions only. The judge, by instructing you about these, is not suggesting to you that they are true. What he's telling you is that the defendant has put these before you, *you can consider them if you choose, but you don't have to*. Or you can give them as little weight as you choose to give them." (Emphasis added.)

Cheever contends the highlighted remark told the jury that it did not have to consider mitigating circumstances. Cheever argues that because the Eighth Amendment is violated when a capital sentencing jury is precluded from considering relevant mitigating evidence that might serve as a basis for a life sentence, the remark was improper.

The Eighth Amendment's concern for "'reliability in the determination that death is the appropriate punishment in a specific case" requires that a capital

sentencing jury not be precluded from considering and giving effect to mitigating evidence offered by a defendant as a basis for a sentence less than death. *Penry v. Lynaugh*, 492 U.S. 302, 328, 1095 S. Ct. 2934, 106 L. Ed. 2d 256 (1989) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S. Ct. 2978, 49 L. Ed. 2d 944 [1976]). In *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978), the Supreme Court considered an Ohio death penalty statute that allowed only three specific factors set out in the statute to be considered in mitigation. The Court held that under its decisions in *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), *Proffitt v. Florida*, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976), and *Jurek v. Texas*, 428 U.S. 262, 96 S. Ct. 2950, 49 L. Ed. 2d 929 (1976), to satisfy the Eighth Amendment's individualized sentencing requirement, "a death penalty statute must not preclude consideration of relevant mitigating factors." 438 U.S. at 608. The Court explained:

> "[A] statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Lockett v. Ohio*, 438 U.S. at 605.

Although *Lockett* involved a statute, it applies "whether the barrier to the sentencer's consideration of

all mitigating evidence is interposed by statute," by a trial court's evidentiary ruling, by jury instructions, or by prosecutorial argument. *Mills v. Maryland*, 486 U.S. 367, 375, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988). See also *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 259 n.21, 127 S. Ct. 1654, 167 L. Ed. 2d 585 (2007) (recognizing that prosecutorial argument that prohibits a jury from being able to consider relevant mitigating evidence can violate the Eighth Amendment).

It is important to understand the scope of the *Lockett* rule, however. It is violated only when the jury is prevented, *as a matter of law*, from considering mitigating evidence. *Eddings v. Oklahoma*, 455 U.S. 104, 113, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982). It does not prohibit a capital sentencing jury from assessing the weight of mitigating evidence "and find[ing] it wanting as a matter of fact[.]" 455 U.S. at 113.

In *Eddings*, the sentencing court had determined that it could not consider the defendant's evidence of his violent upbringing and resulting emotional problems as mitigation because it was not mitigating under the law. The Oklahoma Court of Criminal Appeals agreed, concluding that evidence must tend to provide a legal excuse for criminal conduct in order to be legally relevant to mitigation. In reversing the Oklahoma decision, the Supreme Court recognized the constitutional distinction between considering and rejecting relevant mitigating evidence based on the circumstances of the case and being legally precluded from or refusing to consider such evidence as a matter of law.

We recognized this distinction in *Kleypas*. Based on *Eddings* and subsequent cases, we held that a *Lockett*-based constitutional violation occurs only when the State ""cut[s] off in an absolute manner"" the sentencer's consideration of mitigating evidence. 272 Kan. at 1074 (quoting *Johnson v. Texas*, 509 U.S. 350, 361, 113 S. Ct. 2658, 125 L. Ed. 2d 290 [1993]) (addressing defendant's challenge to the mitigating circumstances instruction). Thus, we held it is constitutionally permissible for a prosecutor to argue, based on the circumstances of the case, that certain circumstances should not be considered as mitigating circumstances. 272 Kan. at 1102-03.

The prosecutor's comment in this case was part of an argument that the mitigating circumstances identified in the instructions were only contentions and, as such, the jury did not have to accept them as established simply because they were listed in the instructions. That comment was not an effort to "cut off in an absolute manner" the jury's consideration of Cheever's mitigating evidence. 272 Kan. at 1074. The larger argument, moreover, was consistent with the law and the instructions. See PIK Crim. 3d 56.00-D ("The defendant *contends* that mitigating circumstances include, but are not limited to, the following . . . ."). See also K.S.A. 21-4624(e); PIK Crim. 3d 56.00-D ("The determination of what are mitigating circumstances is for you as individual jurors to decide under the facts and circumstances of the case."). It was not improper.

Cheever raises the same claim concerning two other comments made during the State's penalty-stage rebuttal argument. The first of these related to

Cheever's mitigating circumstance that he was exposed to drug use in the home:

> "Now, perhaps there was marijuana use at the home. We don't contend there wasn't. But what it boils down to, ladies and gentlemen, is that a mitigator, is that a mitigator which is sufficient to outweigh the aggravating factors we put before you? Marijuana use in the home, that's a bad thing. No question about it. *But does that, as Mr. Evans say[s], excuse what he did*? Is that – does that outweigh the aggravating factors? *We contend it does not and it cannot.*" (Emphasis added.)

The second comment concerned Cheever's mitigating circumstance that he "was addicted to methamphetamine and he was under its influence at the time of the crime." The prosecutor argued:

> "The defendant tells us he was addicted to methamphetamine, and that's the reason, that's a mitigator. Well, tell that to Robert Sanders 'cause he wasn't on methamphetamine that night. Now, you've already decided methamphetamine did not play a role in the capital murder of Matt Samuels. And you should reject it now, too."

Cheever argues these comments told the jury that it did not have to consider mitigating evidence if it did not excuse the crime or have a causal link to the crime. In support, Cheever relies on *Kleypas*, where we held: "A prosecutor who argues that mitigating

circumstances must excuse or justify the crime improperly states the law." 272 Kan. at 1103.

The prosecutor in *Kleypas* made several arguments, discussed at length in the opinion, which we found violated this rule. We reached a different conclusion on a similar claim in *Scott*. There, we acknowledged that while there was some suggestion in the "comments that the defendant's "mental illness did not excuse his culpability," read in context, the comments were an argument "that [the defendant's] mental illness was not as severe as he made it out to be, because it did not 'prevent' him from committing the crimes." 286 Kan. at 118.

The difference between the outcomes in *Kleypas* and *Scott* lies in the distinction recognized in *Eddings*: comments that cut off in an absolute manner the jury's consideration of certain mitigating evidence run afoul of *Lockett*, but comments that the defendant's mitigating evidence is entitled to little or no weight based on the circumstances of the case are constitutionally permissible. 272 Kan. at 1074.

Addressing the "excuse" comment first, we find the comment, considered in context, was permissible. As with the comments in *Scott*, there is some suggestion in the remark that marijuana use in the home did not excuse Cheever's culpability. See *Scott*, 286 Kan. at 118. That remark, however, was followed with: "[D]oes that outweigh the aggravating factors? We contend it does not and it cannot." Viewed in context, the prosecutor's comments did not tell the jury that to be considered in mitigation, evidence of the marijuana use in the home had to excuse or justify the crime as a

matter of law. Instead, the remarks were directed at the weight the jury should give that evidence in deciding whether the mitigating circumstances outweigh the aggravating factors.

Cheever argues that the comment "tell that to Robert Sanders 'cause he wasn't on methamphetamine that night," improperly suggested that his mitigation evidence had to have a causal link to the crime in order to be considered. We disagree. Viewed in context, the comment was part of the State's argument addressing evidence concerning a specific mitigating circumstance: that Cheever was under the influence of methamphetamine at the time of crime. We note that that particular mitigating circumstance *alleged* a causal relationship between the crime and methamphetamine use. Cheever cannot now complain if the State responded to that contention. In any event, the *Eddings* distinction is determinative. The point of the prosecutor's comment was simply that because the evidence showed Cheever committed a violent criminal act when he was not under the influence of methamphetamine, the jury should give little weight to Cheever's mitigating circumstance that he was under the influence of methamphetamine at the time of the crime. As such, it was not improper.

The last comment at issue concerned the jury's rejection of Cheever's voluntary intoxication defense in the guilt stage: "[Y]ou've already decided methamphetamine did not play a role in the capital murder of Matt Samuels. And you should reject it now." According to Cheever, this remark suggested to the jury that because it rejected the voluntary intoxication defense at the guilt stage, it could reject Cheever's

mitigating circumstance that he was under the influence of methamphetamine at the time of the crime. Although the prosecutor said "you *should* reject it," the remark crossed the line between comment on the weight of the evidence as it relates to specific mitigating circumstances and argument to the jury that it *could not* consider a mitigating circumstance *as a matter of law*. Not only is such an argument an incorrect statement of the law, it could lead a juror to refuse to consider legally relevant mitigating evidence, in violation of the Eighth Amendment. We strongly suggest the State avoid this argument on remand.

The convictions and sentences for manufacture of methamphetamine and criminal possession of a firearm are affirmed. The convictions for capital murder and attempted capital murder are reversed, and the case is remanded for a new trial.

* * *

ROSEN, J., concurring: I concur with the majority but write separately only to comment on Cheever's argument that jurors be allowed the opportunity to consider mercy after finding a determination of death is warranted.

As a result of our decision in *State v. Stallings*, 284 Kan. 741, 163 P.3d 1232 (2007), capital defendants are denied the statutory right of allocution to the sentencing jury. See K.S.A. 22-3424(e) (defendant must be given opportunity to address the court, make a statement on the defendant's own behalf, and present evidence in mitigation of punishment). Thus, a capital defendant is deprived of any meaningful opportunity to

make a plea for mercy, indeed for his or her very life, before the sentencing jury makes a decision whether the defendant is to be put to death. I dissented from the decision in *Stallings* and write here to make clear my opinion that Cheever, like all criminal defendants, should be afforded an opportunity to offer a direct allocutory statement in mitigation to his sentencer.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

No. 05-10050-01-MLB

[Filed December 22, 2005]

UNITED STATES OF AMERICA,	)
	)
PLAINTIFF,	)
	)
vs.	)
	)
SCOTT D. CHEEVER,	)
	)
DEFENDANT	)
	)

NOTICE PURSUANT TO FED. R. CRIM. P. RULE 12.2(b)

Mr. Cheever, through undersigned counsel, hereby notifies the plaintiff, United States Government as follows:

(1) On the issue of guilt Mr. Cheever presently intends to introduce expert evidence relating to his intoxication by methamphetamine at the time of the events at the Cooper residence on January 19, 2005, which negated his ability to form specific intent, *e.g.*,

malice aforethought, premeditation and deliberation. The experts will be a psychologist experienced in substance abuse diagnosis and treatment, and a social worker.

(2) On the issue of punishment Mr. Cheever intends to introduce expert evidence further relating to his addiction to methamphetamine and marijuana; his abuse of oxycontin and alcohol; and the social, environmental and biological factors which increased his risk of addiction and diminished his ability to achieve or maintain sobriety, all of which will be presented by qualified psychologists, substance abuse treatment professionals, and a social worker.

Mr. Cheever does not believe that this notice entitles the government to examine Mr. Cheever under the provisions of Fed. R. Crim. P. Rule 12.2(c), except to perhaps evaluate him for substance abuse or addiction.

Respectfully submitted,

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[*Certificate of Service omitted for purposes of this Appendix*]

APPENDIX C

IN THE THIRTEENTH JUDICIAL DISTRICT DISTRICT COURT OF GREENWOOD COUNTY, KANSAS, FOURTH DIVISION

Case No. 06CR198

[Dated October 29, 2007]
[Filed April 2, 2008]

STATE OF KANSAS,	)
	)
Plaintiff,	)
	)
vs.	)
	)
SCOTT D. CHEEVER,	)
	)
Defendant.	)
	)

TRANSCRIPT OF JURY TRIAL
VOLUME V
[APPELLATE VOLUME 27]

[WITNESS: Michael Welner, M.D., pages 80-81]

* * *

* * *

[p. 80]

* * *

Q. What were you asked to evaluate in this particular case?

A. In this particular case I was asked, among other

[p. 81]

things, but I was asked to assess the relationship of methamphetamine and Scott Cheever's use of it on January 19th, 2005, to his killing Matthew Samuels. I was also asked to evaluate and assess Scott Cheever's ongoing methamphetamine use and his -- and the effects of that use, and to what degree that ongoing use over all of that time related to his behaviors in killing Matthew Samuels.

I was also asked to offer an opinion about his perceptions, his decision-making, his ability to control his actions on January 19th, 2005, and to what degree the available information that I could gather from a variety of sources would inform my understanding of his capabilities or his impairments, either in perception, ability to control or make decisions at that time.

I was also asked that, given his history and his explanations, his choices, what alternative explanations, including diagnoses, would account

for what he did, in addition to or as an alternative to, possibly, the role of methamphetamine.

* * *

APPENDIX D

IN THE THIRTEENTH JUDICIAL DISTRICT DISTRICT COURT OF GREENWOOD COUNTY, KANSAS, FOURTH DIVISION

Case No. 06CR198

[Dated October 29, 2007]
[Filed April 2, 2008]

STATE OF KANSAS,	)
	)
Plaintiff,	)
	)
vs.	)
	)
SCOTT D. CHEEVER,	)
	)
Defendant.	)
	)

TRANSCRIPT OF JURY TRIAL
VOLUME V
[APPELLATE VOLUME 27]

[WITNESS: R. Lee Evans, Pharm.D., pages 14-26]

* * *

* * *

[p. 14]

* * *

Q. You're saying that as the drug use continues, certain parts of the brain have some long-term effects; is that right?

A. Yes.

Q. Tell the jury about that.

A. Well, our brain is a pretty interesting organ. Both white matter and gray matter have neurons, which are responsible for transmission of messages. That's how we think and that's how we learn to do things and that's how we maintain memory and all of those kind of things. As you use methamphetamine, what we know is that the actual structure of the brain changes. The brain adapts.

As we begin to use the drug -- and the way the drug works, let's just back up just a moment. The way the drug works is it causes a depletion of dopamine and some other transmitters from presynaptic neurons. A neuron is conceptually a gap, okay, and there's a pre-gap or presynaptic and the gap is called the synapse and then there's a post-synaptic part of the neuron. And so it stimulates the release of the drug from the post-synaptic neuron and also prevents the drug from

[p. 15]

being taken back up by the presynaptic neuron, so it has more of an impact on the post-synaptic neuron which is where we get that high and all those other side effects or effects of the drug.

Well, after awhile those neurons change. They begin to disappear. As a matter of fact, you look at morphological studies from postmortem studies and from PET scans and MRI, what we begin to see is their gray matter in the brain begins to decrease in terms of concentration of those receptors, so the brain size even begins to decrease.

And so there's less function there. You know, that gray matter's part of the limbic system, affects other parts of the brain that are more responsible for things like cognition, executive functions, judgment, you name it.

Q. Decision-making?

A. Decision-making, yes. And as the addiction and the use of methamphetamine goes on, that continues to increase.

Well, when we get to that point, we basically begin to have induced a neurotoxic effect of the drug. All those neurons that we've talked about begin to decrease, and that's a toxic effect,

[p. 16]

side effect of the drug. And that lasts for quite awhile. It lasts forever, as long as somebody's using the substance.

So that really is perhaps, you know, three kind of phases of the pharmacology of the drug, you know, the acute intoxication, the long-term intoxication, the 13 or 14 hours after a dose, and then the chronic piece, which is more neurotoxic in nature. And so it's -- it becomes a very, very dangerous drug.

Q. Would it affect an individual that was suffering from chronic toxicity, chronic use, would it affect that individual's ability to plan?

A. Yeah, those things, all of those cognitive functions that deal with planning, looking at consequences, abstract reasoning, judgment, all of that stuff can be very much affected by the changes in the -- not only the acute stuff, but especially the chronic, the chronic use in the neurotoxic piece.

We even -- we even begin to see -- now, Japan has more of a problem with methamphetamine than we do. And they've had it for a long time. And so a lot of the new research and stuff that's been done on this drug has been done in Japan, and some pretty sophisticated work.

[p. 17]

They see that 80 percent of patients in -- that they study develop a paranoid psychosis, which is just a side effect, a drug-induced side effect, of this drug, which is a horrible, horrible situation to have, because once somebody has reached that, it's even more difficult for them to make reasonable judgments because reality is quite distorted. And they have, you know, a lot of -- a lot of impact from that, in terms of violence. The violence issues with methamphetamine usually come at that stage of use. When they get into the neurotoxic piece and they become -- they develop a psychosis, drug-induced psychosis, that's when we see the most violence with this particular drug.

Q. Why is that? Why does meth lead to violence?

A. Well, there is some -- there is some thought that what happens is that there's so much damage to the parts of the brain that are responsible for the judgment issues and impulse, that it's just a natural consequence. It almost --

Q. Just what?

A. A natural consequence of the use of the drug. It's almost like, you know, if you grabbed a -- they begin to react as if you were grabbing a hot pot on the stove, your natural reaction is to pull back and

[p. 18]

to react to that. Well, their natural reaction to all sorts of stimuli, their paranoid ideation, the thoughts that someone's harming them or coming to get them or whatever the case may be, somebody's trying to steal stuff from them, the KBI is outside, you know, trying to get them, they oftentimes will react to that paranoid thought, whether it's real or not real, and that's what gets them in lots of difficulty and the danger of being violent.

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[p. 20]

* * *

Q. Do you have an opinion about how the use of methamphetamine affected Scott in this case?

[p. 21]

A. Well, I found Scott to be a sad but typical case of progressive methamphetamine use. He had progressed very rapidly to the point where he had developed neurotoxicity. He was showing symptoms of psychosis pretty consistently after he started using it, and periods of time when he was incarcerated things cleared up a little bit, but even then when he was incarcerated people were able to notice and to say that he was -- he was psychotic at the time, after admission or incarceration. And he would immediately go back to using, using the drug after he was released, broke parole, and basically

was out of halfway houses without following through with the plan, and all in terms of seeking the drug, and even with intents, perhaps, to not use, he would end up using.

And it's very difficult for them not to use when the stuff's around, they're back in an environment when other people are using. So Scott basically was on a downhill course with his drug, and the neurotoxicity had set in. He was using all he could get, all he could -- later all he could manufacture, he was using. Even to the point of doing some really stupid things, like crawling, you know, obtaining anhydrous and becoming intoxicated

[p. 22]

or toxic from the effects of that substance, which is a very basic caustic substance. None of us would go crawling in a tank or being in a car with an open anhydrous can.

You know, so he was demonstrating all along really stupid judgment kind of stuff. And the issue of reacting to stimuli or potential threats, running away from perceived threats that were not real, being very suspicious of his friends, even suspicious enough to start carrying a weapon. So the drug has had a hard -- a very, very impactful -- a huge impact on him, in terms of the toxic piece. And he continued to use.

The night in question?

Q. Yes, 1-19 of '05.

A. 1-19, in the wee hours of the morning cooking meth in quote/unquote a friend's house, although I'm not sure that that was truly the case, a threat again appeared, a threat that the sheriff and the police or whomever are on its way, not being comfortable with the people he was with necessarily, feeling like they were going to steal stuff, and lo and behold the sheriff shows up.

Scott, Scott was both not only neurotoxic but acutely intoxicated on top of it all, and I

[p. 23]

think that was pretty much a state of affairs for him for a long time. When the sheriff showed, that was -- he had that hand-on-the-hot-pot reaction, and basically, in his own grandiose, indestructible mechanism or way of thinking, was going to shoot it out with the sheriff.

Q. That was influenced by his meth use; is that right --

A. Yes, I think it was --

Q. -- in your opinion?

A. -- very much influenced by the meth use. It was, you know, it was incredibly -- there was no judgment. There was no judgment at all. This man just did it. And, you know, it's -- I've seen it over and over and over again in people like -- like Scott. There isn't -- there is no thought. It's an action, and it's reaction to a threat, real or imagined. It doesn't seem to matter sometimes.

Q. Let me stop you there, doc.

A. Yeah.

Q. There was a second shot in this case.

A. Yes.

Q. Perhaps the jury might be wondering about the second shot and how meth would have influenced that. Do you have some opinion on that?

[p. 24]

A. Yeah. That's a hard one. My sense about these things, and I see that happen as well, and once it starts, it just continues. It's almost like it's a showdown at the OK Corral. People just automatically begin to do those things. Again, there was a perceived threat. He kept shooting. I don't have -- I get the sense, when I talk to Scott and to other people like him, that they never really think about the consequences. There are no consequences. They're terribly grandiose, and, again, infallible. The whole idea that you would sit there and shoot it out with people from a SWAT -- with a SWAT team, I mean that shows absolutely no judgment whatsoever.

So, yeah, I think it's pretty much drug-induced kind of thinking. Their ability to synthesize all this information and to turn that into a rational piece of judgment is just not there at this point.

* * *

[p. 25]

Q. In your opinion, was Scott intoxicated by meth at the time of the sheriff's shooting?

A. Yes.

Q. Did that affect his ability to plan, to premeditate

[p. 26]

this crime?

A. Yes.

* * *

APPENDIX E

IN THE THIRTEENTH JUDICIAL DISTRICT DISTRICT COURT OF GREENWOOD COUNTY, KANSAS, FOURTH DIVISION

Case No. 06CR198

[Dated October 29, 2007]
[Filed April 2, 2008]

STATE OF KANSAS,	)
	)
Plaintiff,	)
	)
vs.	)
	)
SCOTT D. CHEEVER,	)
	)
Defendant.	)
	)

TRANSCRIPT OF JURY TRIAL
VOLUME V
[APPELLATE VOLUME 27]

[WITNESS: Michael Welner, M.D., pages 95-97]

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[p. 95]

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Q. Now, he had used meth before this?

A. He did.

Q. And how does that impact on your opinion or your findings, your thoughts?

A. Well, in my professional experience, individuals who are engaged in illegal activity with other people who are engaged in illegal activity are often suspicious, and for good reason. Vigilance is a developed and cultivated trait, not only about what you're doing in getting away with it and continuing to get away with it, but also with your confederates and the people that you're hanging out with, to make

[p. 96]

sure that they don't in some way deceive you or take advantage.

So suspiciousness may have nothing to do with a drug, let alone methamphetamine. On the other hand, suspiciousness may also relate to drugs themselves, because they're such a commodity, because they are something to be guarded because everybody wants them. So it's something that not only relates itself to the criminal culture, but also to

the drug culture. And then it relates to the drug itself. How does it relate to the methamphetamine? The question is, were there any signs of intoxication? And no information that I received in reviewing demonstrated a change in his behavior from the time that he made his way there, before he used methamphetamine and had not used it for some time, and was acting on suspicions and giving a walkie-talkie to Matthew Denny before any methamphetamine was used and how he was carrying himself inside the house once police were on his way that he was aware. He was packing up his things, and he was waiting for the tire to be fixed when police came sooner than he anticipated.

So how does it relate to methamphetamine? Methamphetamine use, if it intoxicates someone, it

[p. 97]

will cause a change in that person, physiologically, physically, behaviorally, and there were not signs from the history of a remarkable change in Scott Cheever after he used the methamphetamine that morning.

* * *

APPENDIX F

IN THE THIRTEENTH JUDICIAL DISTRICT DISTRICT COURT OF GREENWOOD COUNTY, KANSAS, FOURTH DIVISION

Case No. 06CR198

[Dated October 29, 2007]
[Filed April 2, 2008]

STATE OF KANSAS,	)
	)
Plaintiff,	)
	)
vs.	)
	)
SCOTT D. CHEEVER,	)
	)
Defendant.	)
	)

TRANSCRIPT OF JURY TRIAL
VOLUME V
[APPELLATE VOLUME 27]

[WITNESS: Michael Welner, M.D., pages 106-113]

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[p. 106]

* * *

Q. Doctor, as part of your interview, did you discuss with Mr. Cheever the consequences of his use of methamphetamine and its effects on him?

A. I did.

Q. And what did he tell you were the consequences of his use of methamphetamine?

Q. Well, in his -- in his reflection, the greatest consequences of his methamphetamine use was that he alienated other people in his life because he was so absorbed in all of the activities of getting the materials, cooking the drug, using it, and just continuing in that life. And because it was such a priority for him, he ignored and was inconsiderate to other people and that was his greatest regret

[p. 107]

about methamphetamine influence on him.

Q. It wasn't violence?

A. He did not mention violence and he did not mention suspiciousness. He mentioned that he was essentially inconsiderate and not respectful of people that he would have otherwise liked and cared about and alienated those relationships.

Q. Doctor, what did you ultimately conclude with respect to the role of methamphetamine in this case with Scott Cheever?

A. With respect to methamphetamine, what I came to learn was that Scott Cheever had used many -- had used methamphetamine on a number of occasions time and again, injected, injected, injected, continuous injections or what would have been described what you probably heard as "runs," and on those instances did not become homicidally violent, and he became violent in the aftermath of methamphetamine use of a far smaller scale.

I would also note that, given what we understand is tolerance, tolerance says that if we go out to a bar and I have three beers, four beers, on this day, I will fall under the table and if I keep drinking those four beers for the next two years you and I will go out in two years and I will

[p. 108]

not fall under the table, it will take more to affect me. And so it goes with different kinds of drugs, that over time if you use more and more, you're not going to be affected to the same degree that you have been at an earlier stage of your drug use, and that tolerance was something that Mr. Cheever appreciated in himself, and so not only were we dealing with a situation where Mr. Cheever, on that day, at that time, when he killed Matthew Samuels, that he used far less, but he was using far less as a person with a tolerance for methamphetamine.

Q. And with that, do you believe that the methamphetamine had an influence or had an impact on his ability to perceive and make decisions and control his actions?

A. I need to actually break that down, perhaps start with perception.

Q. All right.

A. And then the decision and the control, handle them separately.

His perceptions were acute enough that he talked about hearing the gravel when the police car drove up. His perceptions were enough that he could discern that it was Matthew Samuels who came. His

[p. 109]

perceptions were acute enough that he heard the dialogue downstairs and he made it out, not just people talking but what was being said. He was aware of where Matthew Samuels was in relation to him, was aware of him approaching the curtain, so he was aware of what he saw, what he couldn't see, aware of what he heard.

He was aware of his surroundings. He was aware of a window nearby. He was aware of Matthew Denny being there with him and was in a position to play off that both should make sure that the other should keep quiet. He was aware of the fragility of the structure that he wondered about

what would happen if either of them would go out the window and go onto the roof, whether the roof could withstand weight of a person.

He was aware, heard, of Matthew Samuels leaving, going, and knowing that Matthew Samuels was going to come back. And when Matthew Samuels was coming up the stairs, he was aware that he was coming up the stairs. He was also considering, this is venturing into decision-making area, that the curtain, an access to that upper area, was relatively recent and was aware that a number of people might, theoretically, not even notice the

[p. 110]

curtain to go behind and to go up.

So his perceptions of what he saw were unimpaired by all of the information available to me, and even beyond that, what he heared (sic) and of his surroundings were intact, and then he shot, and his awareness was such that even though he engaged Matthew Denny after he shot, he was aware enough that he went back to Matthew Samuels to shoot him again.

So he didn't get diverted and lose track of the surroundings, but went right back and reengaged with a person he had shot and shot him again, and the shots were accurate, which is also an awareness. Not firing wildly, but firing not only shots that hit but lethal shots.

And then after the deputy came in and was removing the sheriff, even before he did, he continued to shoot, and he was aware that there were other police in the area. The information of Deputy Mullins was that he experienced a bullet whizzing by his head, and so that's an accurate shot. And that's a person shooting at a blind target and being accurate enough that a person feels a bullet whizzing by. He was -- his perceptions were acute enough that he only needed to be told once to stop

[p. 111]

shooting and he stopped shooting. And he stopped shooting under the circumstances of an explanation from Mr. Mullins that he was taking Matthew Samuels out.

And this is especially important in light of this whole question of suspiciousness. If he had irrational fears about some sort of threat, it would have been insufficient to merely say "stop shooting," especially because an emotional Deputy Mullins was screaming and cursing downstairs when he saw that Matthew Samuels had been shot, that in spite of the emotional pitch that was now part of the scene, he stopped on a dime, and so his awareness of his surroundings, by all of the information that's available to me, was either intact or even heightened.

Q. Let's talk about his decision-making ability.

A. The decision-making ability, as I've -- as I've assessed it in this case, began with his -- his decision-making once it became clear that the police were there. He made a decision not to try to flee, not to try to run. He made a decision to keep himself where he kept himself, as opposed to another part of the house. He made a decision to stay quiet lest any kind of disturbance aroused suspicion from

[p. 112]

Matthew Samuels downstairs. He made a decision to hold his fire when he did, even though he was armed. He made a decision to hold his fire even after Matthew Samuels approached the first time. And he made a decision to hold his fire even though he knew Matthew Samuels was outside and preparing to come back, that he did not shoot out the window or do anything of a provocative and intimidating way to say, "Stay away, because I will shoot." And he made a decision to shoot when he did.

And then he engaged Matthew Denny and then went back and made a decision to shoot again. And then when he stopped shooting he made a decision to stop shooting. And when he held his fire, he made a decision to hold his fire. And at junctures over the course of the day, when the SWAT team tried to engage him, and in his communications with them, how he handled that, he was not belligerent, he was not provocative. He asked for more minutes. And so this is how he was handling the stress of the moment.

He was quiet and only acted once they came upstairs, but not before he told them, "Don't come up." And so, again, did he say "Don't come up" to Matthew Samuels earlier? No. But when there were

[p. 113]

many people downstairs and they were all about to rush up and with tear gas, he made that decision, not to shoot, but to say, "Don't come up." And then after they came up, that was when he began to shoot. And I might add, referencing the perception issue, to shoot accurately, to hit body shields where the body shields actually were present, and made a decision, when he ran out of ammunition, to immediately surrender, not run for the window, not to jump on someone, but to -- but to surrender and then to, as he put it, to play possum, which is a -- which is a position of complete harmlessness. Not only not to shoot, but to carry himself in a way in which he would convey the greatest sense of harmlessness to people who had just been shot at and who are heavily armed.

Q. And all these things also you talked about demonstrate his ability to control his actions along all these?

A. That's correct.

* * *

APPENDIX G

IN THE THIRTEENTH JUDICIAL DISTRICT DISTRICT COURT OF GREENWOOD COUNTY, KANSAS, FOURTH DIVISION

Case No. 06CR198

[Dated October 29, 2007]
[Filed April 2, 2008]

STATE OF KANSAS,	)
	)
Plaintiff,	)
	)
vs.	)
	)
SCOTT D. CHEEVER,	)
	)
Defendant.	)
	)

TRANSCRIPT OF JURY TRIAL
VOLUME V
[APPELLATE VOLUME 27]

[WITNESS: Michael Welner, M.D., page 116]

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Q. Now, Dr. Welner, have you formed an opinion as to whether the defendant, after injecting methamphetamine on January 19th, 2005, had the ability to think the matter over before acting on the matter?

A. I do have that opinion.

Q. And does he have that ability?

A. In my professional ability, he did.

Q. He did. And have you formed an opinion as to whether the defendant, again after injecting methamphetamine on January 19th, 2005, had the ability to form the intent to kill before the act?

A. I do have an opinion.

Q. Did he have that ability?

A. In my professional opinion, he had that ability.

* * *

APPENDIX H

IN THE THIRTEENTH JUDICIAL DISTRICT DISTRICT COURT OF GREENWOOD COUNTY, KANSAS, FOURTH DIVISION

Case No. 06CR198

[Dated October 29, 2007]
[Filed April 2, 2008]

STATE OF KANSAS,	)
	)
Plaintiff,	)
	)
vs.	)
	)
SCOTT D. CHEEVER,	)
	)
Defendant.	)
	)

TRANSCRIPT OF JURY TRIAL
VOLUME V
[APPELLATE VOLUME 27]

[WITNESS: Michael Welner, M.D., pages 125-130]

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[pg. 125]

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Q. You heard Dr. Evans testify today, right? You sat in the back and listened to his testimony?

A. Yes, sir.

Q. He talked about the effects of meth versus the effects of alcohol, much different. Did you hear that?

A. I did.

Q. Do you agree?

A. He offered a number of opinions and I prefer to really focus on each of his opinions, because there's some opinions that I agree with and there are some opinions that I don't agree with.

Q. See, I'm asking you about that alcohol/meth opinion. Do you agree with that?

A. I think he offered a number of opinions in that regard, and I'd really appreciate it if you could focus me on a specific point that he raised.

Q. Specifically he was asked about the effects of alcohol, the blackouts, the not remembering, and asked to contrast that with methamphetamine intoxication.

A. Of whether people blackout on methamphetamine, and

[p. 126]

he contrasted it with alcohol. Yes, I would agree with that.

Q. You don't contest that Scott used methamphetamine on January the 19th, the day of this homicide, do you?

A. No, I do not.

Q. You don't contest that he was methamphetamine dependent at this time in his life, do you?

A. Yes, I agree with that. (Nods head.)

Q. You agree that he was meth dependent?

A. I agree that he met criteria for a diagnoses of methamphetamine dependence.

Q. Do you agree that the meth on January 19 was affecting him in some way?

A. I think it's quite possible that he was affected by the methamphetamine that day.

Q. Do you agree that the meth that he had done prior to January 19th could still be affecting him on January the 19th of 2005 in some way?

A. No. I think that the -- looking specific -- if --looking specifically at the event that's brought us here, the answer is no. If I would say, in an indirect way, Well, if he was -- if he was not methamphetamine dependent, would he have gone to cook methamphetamine? Well, of course not. So focusing on the event itself of these charges, I

[p. 127]

have to say no, even though I acknowledge that he's methamphetamine dependent, that if there is any influence of methamphetamine, that it would have been the methamphetamine that he did that morning.

Q. You're not telling the jury that he was making good decisions on January 19th of 2005, are you?

A. No. But I am telling the jury that he was making decisions in keeping with priorities that he had established for himself. They are decisions that we might not necessarily agree with, and they're decisions that we would certainly not recommend that others take, but they are decisions that he charted out in -- consistent with other decisions that he was making and the path that he had placed and maintained himself on.

Q. You're not saying the meth didn't affect those decisions, are you?

A. I don't think that the methamphetamine affected his decision to be an outlaw and to identify with outlaws and to make decisions as outlaws do. I

think that it is possible, possible, that methamphetamine made him more aggressive. But it was making a person aggressive who was armed to begin with and who identified not only with outlaws but outlaws who were engaged in fatal shootouts with

[p. 128]

police officers. And so that's a very-- it's a very hued area, because one of the most striking things about Scott Cheever from that morning is that the choices that he was making and the efforts that he was making to avoid capture were pathways that he was embarking on sober as well as under the influence of methamphetamine. And I can't separate that in answering your question.

Q. Did shooting the sheriff help him avoid capture? Didn't it guarantee that he'd be sitting right where he's sitting right now?

A. I need to answer your first question.

Q. Okay.

A. I just need a moment to really think about it. I mean, quite obviously, as we reflect on it, no. But I'm-- I'm pondering what his expectations were. You know, I would agree with Dr. Evans about one point, just -- I wouldn't confine this to people who are methamphetamine users. You know, in my experience of interviewing many, many people who do things that they later come to appreciate that

they're in a whole lot of trouble for, they just don't think --

MR. EVANS: Objection, Your Honor. I don't think this is responsive.

[p. 129]

THE COURT: I don't either. I'll sustain the objection.

BY MR. EVANS:

Q. Let me ask the question. I'll try to ask one question at a time, I promise.

A. All right.

Q. I'll try. Do you think him shooting the sheriff, killing the sheriff, that was not a good decision, was it?

A. Absolutely not.

Q. If his idea was to leave, to get away from the scene, that did not help him get away from the scene, did it?

A. It helped him from being apprehended. And he was thinking, as I was saying a moment ago, he was thinking in the moment, which is not uncommon in many people who carry out ill-advised crime.

Q. Not uncommon for meth users either, is it?

A. Meth users and other people who are not under the influence, but people who act in the moment, think in the moment, and live in such a way that reflects their indifference to the consequences of their actions and indifference to the predicament because they're ready for come what may.

And in keeping with that, I did think that

[p. 130]

it was clinically notable for him to write to an associate that he'd do it again in a heartbeat, and he wrote that sober.

MR. EVANS: Nothing further.

MR. LIND: No redirect.

THE COURT: Thank you, Dr. Welner. And you may step down.

* * *

APPENDIX I

IN THE THIRTEENTH JUDICIAL DISTRICT DISTRICT COURT OF GREENWOOD COUNTY, KANSAS, FOURTH DIVISION

Case No. 06CR198

[Dated October 29, 2007]
[Filed April 2, 2008]

STATE OF KANSAS,	)
	)
Plaintiff,	)
	)
vs.	)
	)
SCOTT D. CHEEVER,	)
	)
Defendant.	)
	)

TRANSCRIPT OF JURY TRIAL
VOLUME V
[APPELLATE VOLUME 27]

[Discussion among the lawyers and the judge, page 61]

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[pg. 61]

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MR. DISNEY: And their expert that just testified relied upon Welner's report. He testified, "I relied upon Welner's report," and this is Welner.

THE COURT: So Dr. Evans, who just testified, relied to a certain extent on Dr. Welner's report?

MR. EVANS: That's true, he did.

MR. DISNEY: Yes.

* * *

APPENDIX J

IN THE THIRTEENTH JUDICIAL DISTRICT DISTRICT COURT OF GREENWOOD COUNTY, KANSAS, FOURTH DIVISION

Case No. 06CR198

[Dated October 26, 2007]
[Filed April 2, 2008]

STATE OF KANSAS,	)
	)
Plaintiff,	)
	)
vs.	)
	)
SCOTT D. CHEEVER,	)
	)
Defendant.	)
	)

TRANSCRIPT OF JURY TRIAL
VOLUME IV
[APPELLATE VOLUME 26]

[WITNESS: Scott D. Cheever, pages 62-65]

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[p. 62]

* * *

Q. And you're up there hiding with Denny on the second floor?

A. Yeah.

Q. Got the gun in your hand?

A. Yeah.

Q. And you heard the sheriff ask, "Where does this lead," words to that effect?

A. Yeah, in hind --

Q. Did you know he was talking about the upstairs?

[p. 63]

A. No, at that point I didn't because in hindsight, I mean, I can look back and say, 'cause Kay, you know, said, "Hey, he's up there," but at this time I didn't know all that was going on. So he's saying, "Where does this lead," and I'm not even thinking he's talking about the upstairs. And she was like, "Well, it's dark." So he goes outside, I guess, and gets his flashlight. I don't know all this is going on. But I look over at Denny and I'm telling him, "Don't move, don't make a sound, just stay right where you are." And about that time I can hear the steps on

the stair and I look out the door and that's when he was on that first landing. And he was right there.

Q. You had the gun in your hand?

A. Yeah, it was cocked and loaded.

Q. Were you planning to shoot the sheriff at this point?

A. Right at that point is probably when I -- I just see him and I just kinda reached out and I pull the trigger and shot him (indicating), and, I don't know, it just -- I panicked, I guess.

Q. Were you waiting for the sheriff to get up there so you could ambush him?

A. No. Just hiding

[p. 64]

Q. As the sheriff was talking to Darrell Cooper at the front door, were you planning to shoot the sheriff as he came upstairs?

A. No.

Q. No?

A. No.

Q. Scott, why'd you have the gun in your hand?

A. I always had the gun in my hand, all the time. Always did.

Q. Had you thought about what was going to happen if the sheriff tried to come upstairs?

A. No. I never thought he'd come upstairs. (Shaking head.) I mean, nobody knew the upstairs is accessible. He wouldn't have known it was either unless Kay, I mean, told him it was, I mean, he'd have never known.

Q. You hear him start to come up the stairs and what happens?

A. That's when I look out the door and he's like right there, and I pull the trigger and shoot him and then as soon as I do that I jump back in the room and I look over at Denny and he's kind of looking at me like "What the hell do I do?" And I tell him, I'm like, "Don't go out the window. They'll shoot you." I said, "Don't go out the window, man. They're

[p. 65]

gonna shoot you." And he's like, "All right, all right." And I turn around and look and I don't see Matt anywhere, and I walk over by the railing and I look down and I see him again, and I pull the trigger again and shoot him. Then I jump back and go back into the room. And I look for Denny and he wasn't there. He'd jumped out the window or something. And --

Q. Before the first shot, you look down, do you see that it's Matt Samuels?

A. Yeah.

Q. So you knew it was Matt Samuels when you shot?

A. Yeah.

Q. Tell me again, why did you shoot?

A. I don't know.

Q. Is this a plan that you'd had?

* * *

APPENDIX K

IN THE THIRTEENTH JUDICIAL DISTRICT DISTRICT COURT OF GREENWOOD COUNTY, KANSAS, FOURTH DIVISION

Case No. 06CR198

[Dated October 26, 2007]
[Filed April 2, 2008]

STATE OF KANSAS,	)
	)
Plaintiff,	)
	)
vs.	)
	)
SCOTT D. CHEEVER,	)
	)
Defendant.	)
	)

TRANSCRIPT OF JURY TRIAL
VOLUME IV
[APPELLATE VOLUME 26]

[WITNESS: Scott D. Cheever, page 119-129]

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Q. You knew that the sheriff came in the house, correct?

A. Yes, sir.

Q. And then you knew he left to go get the flashlight?

A. No, sir.

Q. You heard him leave -- you heard him ask, "Where does this lead to"?

A. Yes, sir.

Q. You knew he had to go get the flashlight, correct?

A. No, sir.

(Whereupon, a sotto voce discussion was had between Mr. Disney and Mr. Lind.)

Q. You hear the cop come in, correct?

A. Yes, sir.

Q. The sheriff come in?

A. Yes, sir.

Q. And he asked if you were there, correct?

A. Yes, sir.

Q. And Darrell said no?

A. Yes, sir.

Q. And then the sheriff said, "Do you mind if I look

[p.120]

around?" Correct?

A. Yes.

Q. And Darrell said, "Yeah, go ahead"?

A. Yes.

Q. And then the sheriff said, "Do you mind if we go upstairs?"

A. No, sir.

MR. DISNEY: Your Honor, can we approach?

THE COURT: Yes, you may.

(Bench conference was held as follows:)

THE COURT: Is this an interview with the defendant?

MR. DISNEY: No, this is an interview done with -- by Dr. Welner of the defendant, and I want to impeach him.

MR. EVANS: I object to using Welner, Judge. This is my reason. Had we -- had the case never gone to federal court -- and you heard a similar motion for Mr. Frieden. We've done nothing that would have triggered Dr. Welner's ability to preinterview Mr. Cheever. We didn't file a Notice of Intent of mental defect or defense. There would be no way that Welner would have been talking to Mr. Cheever pretrial in this setting. And I don't think they should be able to

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use this material in this context, because we've done nothing, Mr. Cheever's done nothing, to -- that would allow Welner's role in this at this point.

THE COURT: Is Welner going to be your rebuttal witness to their Monday witness?

MR. DISNEY: Uh-huh.

THE COURT: So he will testify?

MR. DISNEY: He will testify.

MR. EVANS: We're going to interpose the same objection, Judge --

THE COURT: Right.

MR. EVANS: -- at that time.

THE COURT: Well, this is a prior inconsistent statement given to a witness who will testify and I will allow it. You need --

MR. DISNEY: I thought that was going out there --

THE COURT: So I will -- your objection is noted and overruled.

MR. EVANS: Yes, sir.

THE COURT: And you may proceed on that basis.

MR. DISNEY: Thank you.

(Thereupon, the following proceedings

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continued in the hearing of the jury, with the defendant present.)

BY MR. DISNEY:

Q. Sir, do you recall being interviewed on July 12th, 2006, by an individual by the name of Mike Welner?

A. Yes, sir.

Q. And do you recall a conversation that you had with him regarding the conversation between Darrell and the sheriff?

A. Yes, sir.

Q. And do you recall what you told Mr. Welner about what the sheriff said about coming upstairs?

A. No, sir.

Q. Would it help if you could read that portion of the interview to refresh your memory?

A. Yes, sir.

Q. I'm going to give you just a few moments. Why don't you just read this whole page.

A. (The witness complies.) (Nods head.)

Q. You had the opportunity to read that?

A. Yes, sir.

Q. Does that refresh your memory about what you told Mr. Welner about the conversation Darrell and the sheriff had?

A. Yes, sir.

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Q. And you told Mr. Welner that the sheriff comes in, correct?

A. Yes, sir.

Q. And he asks if he could look around, correct?

A. Yes, sir.

Q. And Darrell said, "Yeah, go ahead," correct?

A. Yes, sir.

Q. And you said that the sheriff then came in and looked around, correct?

A. Yes, sir.

Q. And then you, yourself, told Mr. Welner that Darrell said, "Do you mind if we look upstairs?"

A. Who said that?

Q. You said it to Dr. -- to Mr. Welner, correct?

A. Yes, sir.

Q. You told Mr. Welner that you heard Darrell say, "Do you mind if we look upstairs," correct?

A. Darrell?

Q. You told Mr. Welner that's what Darrell said, isn't it?

A. I might have told Welner that, but that's not what happened.

Q. I want to show you a portion of an interview that you had.

A. All right.

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MR. DISNEY: If I can have just a moment, Your Honor.

THE COURT: Are we talking about State's Exhibit 150A? I know it's not been admitted, but is that the document you're referring to?

MR. DISNEY: Yes.

THE COURT: Okay.

MR. DISNEY: We're on page 64.

THE COURT: You might refer to it by page number for the record.

MR. DISNEY: Okay, we're on page 64.

THE COURT: All right.

BY MR. DISNEY:

Q. I want to play a portion of that interview for you.

A. All right.

THE COURT: Just a minute.

MR. EVANS: Same objection, judge.

THE COURT: It's not in evidence yet.

MR. DISNEY: I'm using it to refresh his memory, Your Honor.

THE COURT: You're going to play the oral interview?

MR. DISNEY: Yes.

THE COURT: Is that what you want to do?

MR. DISNEY: Yes.

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THE COURT: Okay. Well --

MR. DISNEY: I'm not asking that be admitted.

THE COURT: Well, has he seen the written transcript of the oral interview?

MR. DISNEY: He has.

THE COURT: And that's at page 64?

MR. DISNEY: Yes, sir.

THE COURT: How do you propose to narrow what you're going to play to what we've talked about so far?

MR. DISNEY: We will play just the time slots regarding that.

THE COURT: Which are what?

MR. DISNEY: From -- I would propose playing from the top of the page down to 3:34:36.

THE COURT: All right. Your objection is noted, Mr. Evans, and I will allow the State to play that portion of the --

MR. DISNEY: I just want to make sure I have it set up.

THE COURT: Okay. Of the State's Exhibit 150A.

MR. EVANS: Judge, may I ask a voir dire question first?

[p. 126]

THE COURT: You may.

VOIR DIRE EXAMINATION

BY MR. EVANS:

Q. Scott, are you denying you told Welner this?

A. No, sir.

Q. You admit that you told Welner this?

A. Yeah. A lot of that conversation was in hindsight. 'Cause when you go back and you can look at what really happened, and then you can say, oh, this is, you know, I mean, but --

Q. You told Welner about the flashlight, the sheriff's going to get the flashlight?

A. Yeah, but I didn't even know it at the time. I mean, it would be impossible for me to know.

Q. But now you don't think that happened?

A. No, it couldn't have happened.

MR. EVANS: I don't think it's impeachment, Judge. I would interpose another -- that objection as well.

THE COURT: Okay. Well, I think it is prior inconsistent statement that is -- he can be impeached with, so I will permit it.

MR. DISNEY: Are you going to be able to get it?

LEGAL ASSISTANT: I'm hoping to.

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CONTINUED CROSS-EXAMINATION

BY MR. DISNEY:

Q. Sir, let's do it this way, just tell me if I read this right.

The words I'm about to read are your words, correct, at -- starting at 3:33:54?

A. Yes, sir.

Q. You told Mr. Welner , "And Darrell said, 'No.' He's, like" -- "he" being Sheriff Samuels, correct, correct?

A. Yes, sir.

Q. "Sheriff Samuels says, 'Do you mind if I look around for him?' And Darrell said, 'Yeah, go ahead.' So he comes in and looks around and he said, 'Do you mind if we look upstairs?' And Darrell said, 'Go ahead.' And he starts to come upstairs and he said, 'Well, I better go get a flashlight. It's kinda dark up there.' So he goes back out and he gets a flashlight, and I'm looking at Denny and he's over by the window and he's looking at me like 'What do I do?' And I'm like, 'I don't know, man.' And I turn around and look and he's right there."

Does what I read accurately describe what you told Mr. Welner?

A. Dr. Welner, yes, sir.

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Q. You told this to Welner back in July of 2006, correct?

A. Yes, sir.

Q. You hadn't used meth in quite awhile, had you?

A. No.

Q. Not since that January 19th day?

A. Yes, sir.

Q. You weren't delusional or paranoid when you talked to Mr. Welner, were you?

A. Maybe a little intimidated.

Q. Maybe a little intimidated by -- you know, you were in a custodial situation.

A. Yes, sir.

Q. You were trying to tell him the truth?

A. Yes.

Q. And you believed what you told him?

A. At that time, yes.

Q. You knew the sheriff was coming upstairs?

A. After a time, yes.

Q. What do you mean "after a time"?

A. After I heard footsteps coming upstairs.

Q. You heard the sheriff say, "Do you mind if I go look upstairs?"

A. No, sir.

Q. That's what you told Dr. Welner?

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A. Yeah, that was in hindsight.

Q. I don't understand what this "in hindsight" means. Explain that.

A. It means -- I mean, I can look at the testimonies, you know, and previous hearings, you know, by KBI and everybody else, you know, I can see pictures later, I can see the flashlight and he went and got his flashlight, but at the time how was I to know that? I mean --

Q. You're just describing to Welner what you remembered, right?

A. No, I was describing what happened.

Q. And what happened was that the sheriff said he's gonna go get his flashlight so he could come upstairs, correct?

A. No, he didn't say that.

Q. Huh?

A. He didn't say that.

Q. You told Dr. Welner he did?

A. Yes.

* * *

OPPOSITION BRIEF

No. 12-609

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF KANSAS - PETITIONER

VS.

SCOTT D. CHEEVER - RESPONDENT

On Petition for Writ of Certiorari to the Supreme Court of Kansas

---

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Respondent, Scott Cheever, respectfully requests that this Court deny the petition for writ of certiorari.

STATEMENT OF FACTS

The respondent is in general agreement with the petitioner's factual statement. However, Mr. Cheever disputes the State's assertion that he "ambushed" Sheriff Samuels. (Petition, page 5). Mr. Cheever testified at trial that he shot Sheriff Samuels in a panic; that he was not waiting to ambush him, rather, he was just hiding, and that he did not plan to kill the sheriff:

> Q. You had the gun in your hand?
>
> A. Yeah, it was cocked and loaded.
>
> Q. Were you planning to shoot the sheriff at this point?
>
> A. Right at that point is probably when I – I just see him and I just kinda reached out and I pull the trigger and shot him (indicating), and, I don't know, it just – I panicked, I guess.
>
> Q. Were you waiting for the sheriff to get up there so you could ambush him?
>
> A. No, just hiding.
>
> Q. As the sheriff was talking to Darrell Cooper at the front door, were you planning to shoot the sheriff as he came upstairs?
>
> A. No.

(Transcript of Testimony of Scott Cheever, Appellate Volume 8, pages 62-63).

With regard to the testimony of Dr. Welner, Mr. Cheever would note that the doctor's testimony went beyond the summary provided by the petitioner. Dr. Welner

addressed the intoxication defense and, as described in the petitioner's statement of the facts, expressed his opinion that Mr. Cheever was able to form the premeditated intent to kill. However, he then went beyond rebutting Mr. Cheever's intoxication defense and testified that Mr. Cheever committed these crimes because he had chosen to be an outlaw:

> A. ...And [I] looked at personality conditions, personality disorders, because personality disorders are conditions but they're conditions not so much – the difference between a condition and a personality disorder is that if you develop, for example, panic disorder, you don't want panic attacks, you seek help for panic attacks. That's a condition. What a personality disorder is is that everybody else doesn't want you to be that way, but you want to be that way because it suits you. And it's not just what was mentioned earlier, antisocial. People can have dependent personality. Nobody wants 'em to be dependent, but they want to be dependent because it suits them and they are comfortable with it.
>
> So in looking at all of the different possibilities one considers those diagnoses as well. And, lastly, just environment phenomena. Who did he want to be? What was the script of his life as he was laying it out at that time? And I had to consider that in the context of the efforts that he made to make sure he would not go back into custody.
>
> Q. And in that vein did you – did he talk to you during your interview about his fascination with outlaws?
>
> A. We talked about the people who were important to me, and what – what I came to learn in my interview is that Scott Cheever was one of these unusual people who's actually exposed to a variety of different people in his life. He had people who were

> criminal types. He had people who were not criminal types but who were drug users. He had people who were clean and straight and were athletes. He had people who were not athletes and clean and straight but elders and were responsible people. And because he was, other people perceive different things. According to him his grandmother perceived him to be bright. Other people perceived him to be an extremely talented athlete, and he was, and responded to him as people naturally do to a very talented athlete. And other people found him mannerly, because he was able to be polite with others. So what I found in the interview was that, from him, was that he found himself identifying with and looking up to people that he alternatively described as bad boys or outlaws, and looking up to them and being impressed and awed by them, and in certain instances wanting to outdo them.

(Transcript of Jury Trial, Volume 5, Appellate Volume 27, pages 104-106).

On cross-examination Dr. Welner testified that Mr. Cheever was dependent on methamphetamine in January, 2005, but "he was making decisions in keeping with priorities that he had established for himself." (Transcript of Jury Trial, Volume 5, Appellate Volume 27, page 127). He stated, "I don't think methamphetamine affected his decision to be an outlaw and to identify with outlaws and to make decisions as outlaws do. I think that it is possible, possible, that methamphetamine made him more aggressive. But it was making a person aggressive who was armed to begin with and who identified not only with outlaws but outlaws who were engaged in fatal shootouts with police officers." (Transcript of Jury Trial, Volume 5, Appellate Volume 27, page 127-128).

Dr. Welner's testimony also encompassed more than a rebuttal to the intoxication defense when he testified that Mr. Cheever had no remorse for Sheriff Samuel's death. He

testified that at the time of their interview, Mr. Cheever had "...no sign of depression, no sign of sadness, no sign of preoccupation with the event or its consequences or other people affected by it..." (Transcript of Jury Trial, Volume 5, Appellate Volume 27, page 86). He returned to a theme of lack of remorse for these crimes later in his testimony:

> Q. Doctor, as part of your interview, did you discuss with Mr. Cheever and the consequences of his use of methamphetamine and its effects on him?
>
> A. I did.
>
> Q. And what did he tell you were the consequences of his use of methamphetamine?
>
> A. Well, in his – in his reflection, the greatest consequences of his methamphetamine use was that he alienated other people in his life because he was so absorbed in all of the activities of getting the materials, cooking the drug, using it, and just continuing in that life. And because it was such a priority for him, he ignored and was inconsiderate to other people and that was his greatest regret about methamphetamine influence on him.
>
> Q. It wasn't violence?
>
> A. He did not mention violence and he did not mention suspiciousness. He mentioned that he was essentially inconsiderate and not respectful of people that he would have otherwise liked and cared about and alienated those relationships.

(Transcript of Jury Trial, Volume 5, Appellate Volume 27, pages 106-107).

REASONS WHY THE PETITION SHOULD BE DENIED

1. The decision of the Kansas Supreme Court is not final; this Court should decline jurisdiction under 28 U.S.C. Section 1257(a).

Under 28 U.S.C. § 1257(a) this Court's review of state court decisions is available only with respect to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision [on a federal question] could be had." This Court has observed that the language of that statute "would justify an interpretation of the final-judgment rule to preclude review 'where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State.'" Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 476-477 (1975), *citing* Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124 (1945).

The decision rendered by the Kansas Supreme Court in this case did not dispose of all the issues presented on direct appeal. Although the court ruled that error in the admission of Dr. Welner's testimony required reversal of Mr. Cheever's conviction of capital murder, the court found several other errors, without determining whether those errors required reversal of his conviction or his sentence of death. Additionally, two other issues were raised in Mr. Cheever's brief, but not addressed in the opinion. Should this Court grant certiorari, and reverse the decision of the Kansas Supreme Court, the litigation on direct appeal will not be over. Mr. Cheever will request further review in the Kansas Supreme Court on the following issues raised on direct appeal and not finally resolved by that court's opinion:

1. Did the trial court's failure to instruct on felony murder as a lesser included offense of capital murder require reversal of Mr. Cheever's conviction for capital murder? The Kansas

Supreme Court agreed with Mr. Cheever that, under Kansas law, felony murder is a lesser included offense of capital murder, and that, where the facts support it, an instruction on that lesser included offense should be given. State v. Cheever, 284 P.3d 1007, 1013 Syl. ¶ 11 (Kan. 2012). The Court did not determine whether the facts of Mr. Cheever's case required the instruction or whether the trial court's failure to instruct on felony murder required reversal of his conviction of capital murder. 284 P.3d 1028.

2. Did the trial court's comments, informing all potential jurors that Mr. Cheever's case could be reviewed by an appellate court, require reversal of his sentence of death? The Kansas Supreme Court agreed with Mr. Cheever that the court's statements to the venire, regarding appellate review, were improper, but did not determine whether the error required reversal of Mr. Cheever's sentence of death. 284 P.3d 1030.

3. Did the trial court's failure to instruct the jury, as a prerequisite to consideration of the death penalty, that it must find, beyond a reasonable doubt, that Mr. Cheever was at least eighteen years old at the time of the crime require reversal of his sentence of death? The Kansas Supreme Court agreed with Mr. Cheever that the fact that the defendant was eighteen years or older at the time of the offense was a fact necessary for the imposition of the death penalty and that it must be found by the jury beyond a reasonable doubt. 284 P.3d 1013, Syl. ¶¶ 14, 15. The Court did not determine whether the failure to so instruct and submit that question to the jury required reversal of Mr. Cheever's sentence of death. 284 P.3d 1032.

4. Did error in the trial court's instruction regarding mitigating circumstances require reversal of Mr. Cheever's sentence of death? The Kansas Supreme Court agreed with Mr. Cheever that the instruction on mitigating circumstances in this case did not conform to

Kansas law, as it did not inform the jurors that mitigating circumstances need only be proved to the satisfaction of the individual juror and not beyond a reasonable doubt. The Court did not determine whether the error in the instruction required reversal of Mr. Cheever's sentence of death. 284 P.3d 1032.

5. Did prosecutorial misconduct require reversal of Mr. Cheever's sentence of death? The Kansas Supreme Court agreed with Mr. Cheever that certain comments of the prosecutor improperly and erroneously suggested to jurors that they could not consider one of Mr. Cheever's proffered mitigating circumstances as a matter of law, and that such comments could lead a juror to refuse to consider legally relevant mitigating evidence. The Court did not determine whether this error required reversal of Mr. Cheever's sentence of death. 284 P.3d 1036.

6. Did Dr. Welner's testimony exceed the bounds of proper rebuttal and require reversal of Mr. Cheever's conviction of capital murder or his sentence of death? Because the Kansas Supreme Court found that Dr. Welner's testimony was inadmissible, the Court did not address Mr. Cheever's additional argument on this issue. This argument is found on pages 114-121 of his opening brief on direct appeal, and reproduced at Appendix A. Mr. Cheever argued that, should the court find that by raising a voluntary intoxication defense, he waived his Fifth Amendment rights to the extent necessary to rebut that defense, the district court erred when it ruled the prosecution could go beyond rebuttal and offer its alternative theory of the case – that Mr. Cheever committed these crimes because he had a personality disorder or had chosen to be an outlaw.

7. Is K.S.A. 21-3439(a)(5) unconstitutional, in violation of the Eighth Amendment to the United States Constitution and Section Nine of the Kansas Constitution Bill of Rights as it

fails to properly narrow the class of persons eligible for the death penalty? Mr. Cheever argued that the subsection providing that the intentional, premeditated murder of a law enforcement officer is capital murder is unconstitutional because it does not limit its application to situations in which the killing is related to victim's status or duties as a law enforcement officer. This argument is found on pages 42-85 of Mr. Cheever's opening brief and reproduced in part at Appendix B. It was not addressed by the Kansas Supreme Court in its opinion.

In Johnson v. California, 541 U.S. 428 (2004), this Court granted certiorari to review a decision of the California Supreme Court on a *Batson* issue. After briefing and argument, this Court dismissed the case for lack of jurisdiction. The circumstances were similar to this case. The petitioner's convictions were reversed due to *Batson* error, by the California Court of Appeals. That Court also noted other claims of trial error, but did not rule on them. 541 U.S. 429. Then the California Supreme Court reversed the Court of Appeals on the *Batson* issue, and, like the Court of Appeals, did not address the petitioner's other claims. When this Court granted certiorari it was unaware that there were other claims that had not been resolved. This Court found that, due to those unresolved issues, the California Supreme Court's decision was not final for purposes of 28 U.S.C. § 1257(a). 541 U.S. 431.

In the same manner, Mr. Cheever brought other claims to the Kansas Supreme Court which were not finally decided by that court, but which could require reversal of his conviction and/or sentence regardless of any action this Court takes on the petitioner's claims.

Mr. Cheever acknowledges that in Cox Broadcasting Corp. v. Cohn, supra this Court noted that there are situations in which this Court grants review, even when there are further

proceedings to be had in the lower state courts, without waiting for the proceedings to be complete. Among those are the situation where "the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case. Thus, in these cases, if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claims for review." 420 U.S. 481. This case arguably falls in that category.

Despite that, this Court should decline to exercise its discretionary jurisdiction to hear this case for the reasons discussed below.

2. The petitioner's constitutional argument was not presented to the Kansas Supreme Court for determination, and should be considered waived by this Court.

In seeking a writ of certiorari in this case, the State's primary argument is that the Kansas court improperly relied on the state statutory definitions of the mental disease/defect and voluntary intoxication defenses to determine the scope of Mr. Cheever's Fifth Amendment rights, and in so doing placed itself in direct conflict with this Court's decision in Buchanan v. Kentucky, 483 U.S. 402 (1987). However, this argument was not made to the Kansas Supreme Court. As described in that Court's opinion, Mr. Cheever argued that his temporary intoxication defense did not act as a waiver of his Fifth Amendment rights with regard to a court-ordered psychological evaluation and relied in part on state statutes and the court's previous interpretations of those statutes. Instead of claiming that Mr. Cheever's argument conflicted with Buchanan, and that it would be improper for the court to look to state law, and state precedent, in resolving the Fifth Amendment question, the State

argued that the fact that the evaluation was legally obtained rendered it admissible. The State's argument is reproduced, in its entirety, at Appendix C. The State was aware of state law precedent and had the opportunity to argue that those cases, in light of Buchanan, were incorrectly decided. The State's decision to instead rely on the fact that the evaluation was properly conducted in the federal prosecution, should be considered a waiver of the current argument. Because the Kansas Supreme Court was never presented with the argument now advanced by the petitioner, this Court should decline jurisdiction.

In District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 483 (1983), this Court stated:

> By failing to raise his claims in state court a plaintiff may forfeit his right to obtain review of the state court decision in any federal court. This result is eminently defensible on policy grounds. We have noted the competence of state courts to adjudicate federal constitutional claims. See, e.g., *Sumner v. Mata*, 449 U.S. 539, 549, 101 S.Ct. 764, 770, 66 L.Ed.2d 722 (1981); *Allen v. McCurry*, 449 U.S. 90, 105, 101 S.Ct. 411, 420, 66 L.Ed.2d 308 (1980); *Swain v. Pressley*, 430 U.S. 372, 383, 97 S.Ct. 1224, 1230, 51 L.Ed.2d 411 (1977). We also noted in *Cardinale* that one of the policies underlying the requirement that constitutional claims be raised in state court as a predicate to our certiorari jurisdiction is the desirability of giving the state court the first opportunity to consider a state statute or rule in light of federal constitutional arguments. A state court may give the statute a saving construction in response to those arguments. 394 U.S., at 439, 89 S.Ct., at 1163.

See also, Sprietsma v. Mercury Marine, a Div. of Brunswick Corp., 537 U.S. 51, 56, f.n. 4 (2002)(" Brunswick has asserted that federal maritime law governs this case. Because this argument was not raised below, it is waived.")

While it is true that Mr. Cheever raised the question of the scope of his Fifth Amendment rights below, the State did not ask the Kansas Supreme Court to consider the argument now pressed on this Court. Given that court's role as the ultimate expositor of state law, Mullaney v. Wilbur, 491 U.S. 684, 691 (1975), the Kansas court should have been

given the first opportunity to consider Kansas' statutory enactments in light of the argument now advanced by the State.

3. The decision of the Kansas Supreme Court upholds, rather than conflicts with, the holding of Buchanan v. Kentucky. The decision rests on the particular facts of this case and appropriately harmonizes Buchanan with the parameters of the mental disease/defect defense and the voluntary intoxication defense as defined under state law.

This Court framed the issue in Buchanan in this way:

> ... the case raises the question whether the admission of findings from a psychiatric examination of petitioner proffered solely to rebut other psychological evidence presented by petitioner violated his Fifth and Sixth Amendment rights where his counsel had requested the examination and where petitioner attempted to establish at trial a mental-status defense.

Buchanan v. Kentucky, 483 U.S. 402, 404 (1987).

The holding of the Kansas Supreme Court can exist in harmony with this Court's decision in Buchanan because Mr. Cheever did not request a psychological examination and he did not raise a mental-status defense as defined by Kansas law.

In Buchanan, the petitioner was attempting to establish the defense of "extreme emotional disturbance" at his trial. 483 U.S. 408. He introduced the results of psychological examinations stating that he had a thought disorder, was depressed, dependent, impulsive, immature, severely emotionally disturbed, very easily confused, easily led, with limited capacity for insight, and on the verge of full-blown schizophrenia. 483 U.S. 409-410, fn 9. The prosecution countered with another psychological report characterizing him as sophisticated and capable of manipulative and conning type behaviors. 483 U.S. 410, fn.10.

This Court found that the admission of the second report did not violate the defendant's Fifth or Sixth Amendment rights, relying on its precedent established in Estelle v. Smith, 451 U.S. 454 (1981) where this Court held:

> "When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case. Accordingly, several Courts of Appeals have held that, under such circumstances, a defendant can be required to submit to a sanity examination conducted by the prosecution's psychiatrist." *Id.*, at 465, 101 S.Ct., at 1874.
>
> We further noted: "A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding." *Id.*, at 468, 101 S.Ct., at 1875. This statement logically leads to another proposition: if a defendant requests such an evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution.

Buchanan, 483 U.S. 422-423.

Mr. Cheever's case presents quite a different situation. No psychological or psychiatric evaluations were offered in this case. No diagnosis of a mental disease or defect was offered. Instead, Dr. Evans, a doctor of pharmacy, testified about the physical effects of methamphetamine use. He testified that long term abuse of that drug can lead to a *temporary* paranoid psychosis, and that Mr. Cheever was showing signs of that type of temporary psychosis. He testified that the effects of the drug affected his ability to plan, form intent and premeditate.

Importantly, the Kansas Supreme Court noted that in situations where drug or alcohol abuse results in permanent impairment, evidence on this impairment would constitute evidence of a mental disease or defect, to which, presumably, the statutory notice provisions, and provisions for prosecutorial access to the defendant for an evaluation would

come into play. "Evidence of permanent mental incapacity due to long-term use of intoxicants, however, may support a mental disease or defect defense." Cheever, 284 P.3d 1023. However, in this case, the court noted, Mr. Cheever did not present evidence that his use of methamphetamine had caused permanent mental impairment. 284 P.3d 1024.

In holding that Mr. Cheever's evidence did not rise to the level of a defense of mental disease or defect, which would waive Mr. Cheever's Fifth Amendment rights with regard to Dr. Welner's previous examination, the Kansas Supreme Court did no violence to this Court's holding in Buchanan. Rather the court appropriately examined the law regarding mental disease/defect as defined by the state legislature, and harmonized that law with this Court's Fifth Amendment jurisprudence.

Under Kansas law, the defense of "lack of mental state" is codified at K.S.A. § 21-5209 (formerly K.S.A. § 22-3220):

> It shall be a defense to a prosecution under any statute, that the defendant, as a result of mental disease or defect, lacked the culpable mental state required as an element of the crime charged. Mental disease or defect is otherwise not a defense.

Before adopting K.S.A. § 22-3220, in 1996, Kansas had two defenses relating to mental disease or defect: insanity and diminished capacity. Criminal insanity was evaluated using the *M'Naghten* test, and a claim of diminished capacity could be used for the limited purpose of negating specific intent. However, K.S.A. 22–3220 abolished the defense of insanity and instead focused on a lack of the mental state required as an element of the offense charged. A criminal defendant can no longer raise insanity or diminished capacity as a defense. State v. White, 279 Kan. 326, 333, 109 P.3d 1199 (2005); State v. Davis, 277 Kan. 309, Syl. ¶ 7, 310, 85 P.3d 1164 (2004).

Under Kansas law, and consistent with this Court's ruling in Buchanan, a defendant offering a defense of mental disease or defect, must provide notice to the prosecution that he or she intends to offer such a defense and must submit to any mental examination ordered by the court. K.S.A. § 22-3219 .

Kansas law draws a sharp distinction between the defense of mental disease or defect and voluntary intoxication. K.S.A. § 21-5205 (formerly K.S.A. § 21-3208) provides:

> (a) The fact that a person charged with a crime was in an intoxicated condition at the time the alleged crime was committed is a defense only if such condition was involuntarily produced and rendered such person substantially incapable of knowing or understanding the wrongfulness of such person's conduct and of conforming such person's conduct to the requirements of law.
>
> (b) An act committed while in a state of voluntary intoxication is not less criminal by reason thereof, but when a particular intent or other state of mind is a necessary element to constitute a particular crime, the fact of intoxication may be taken into consideration in determining such intent or state of mind.

Under Kansas law, the defense of voluntary intoxication is neither an insanity defense, nor the defense of mental disease or defect. The Kansas Supreme Court held in State v. Kleypas, 272 Kan. 894, Syl. ¶ 1, 40 P.3d 139 (2001) *overruled on other grounds,* State v. Marsh, 278 Kan. 520, 535, 102 P.3d 445 (2004):

> Evidence of a defendant's mental disease or defect excluding criminal responsibility is not admissible at a trial unless the defendant serves upon the prosecuting attorney and files with the court a written notice of such defendant's intention to assert the defense that the defendant, as a result of mental disease or defect, lacked the mental state required as an element of the offense charged. K.S.A. 22-3219. However, **insanity and voluntary intoxication are two separate defenses. No notice of an insanity defense is required where the evidence points only to a temporary mental state negating specific intent caused by the voluntary consumption of alcohol.**

(emphasis added).

In Kleypas, the defendant called an expert witness to testify that he had suffered from an alcoholic blackout around the time of the alleged crimes. The State

objected to the witness' proposed testimony, arguing that the defendant had withdrawn his previously filed notice under K.S.A. 22-3219 that he was relying on the defense of mental disease or defect. 272 Kan. 917. The trial court agreed with the State, viewing the evidence as an attempt to assert a defense of mental disease or defect. 272 Kan. 918. The trial court noted that if the notice not been withdrawn, the State could have had the defendant examined by a psychiatrist of its own choosing to rebut the evidence. 272 Kan. 918. The Kansas Supreme Court found that the district court erred when it did not allow the expert to express his opinion as to whether the defendant experienced a blackout at the time of the offenses. 272 Kan. 921.

The court relied on its previous decision in In re Habeas Corpus Petition of Mason, 245 Kan. 111, 113, 775 P.2d 179 (1989). Kleypas, 272 Kan. 920. In Mason, the Court granted the petitioner's request for a writ of habeas corpus, on the grounds that the district court erred when it declared a mistrial in his first trial, rendering his second trial a violation of his Fifth Amendment right against double jeopardy. The trial court had granted the State's motion for mistrial, after defense counsel, in opening, told the jury that the defendant was unable to form intent to commit the crimes charged because of his alcohol consumption and the fact that he was experiencing a blackout. Counsel for the defense proposed to offer expert testimony on the effects of alcohol abuse after a period of sobriety, as well as the effects of the medications that the defendant was taking. The district court agreed with the State that defense counsel's opening was improper and required a mistrial because the defense had not filed a notice that it was presenting an insanity defense under K.S.A. 22-3219. The Kansas Supreme Court disagreed, first noting that the defendant is only required

to give notice, under Kansas law, when asserting the defense of insanity and the defense of alibi. 245 Kan. 112. The court distinguished insanity from voluntary intoxication, holding that the *temporary* mental incapacity produced by voluntary intoxication is not insanity. The court noted that an instruction on insanity might be required where continued use of intoxicants leads to a *permanent* impairment. The court stated:

> To hold that evidence of a temporary mental condition caused by voluntary intoxication requires the defense to plead insanity would be to abolish the distinctions between the two defenses clearly laid out by statute and our cases. No notice of an insanity defense is required where the evidence points only to a temporary mental state negating specific intent caused by the voluntary consumption of alcohol. The trial court thus erred in declaring a mistrial.

245 Kan. 114.

In reaching this conclusion, the Court relied on State v. Seely, 212 Kan. 195, 197, 510 P.2d 115 (1973)(mental incapacity produced by voluntary intoxication, existing only temporarily at the time of the criminal offense does not reach the level of insanity) and State v. James, 223 Kan. 107, 110, 574 P.2d 181 (1977)(an insanity defense may be warranted where the continued use of intoxicants leads to permanent mental deterioration or disease). See, State v. Sappington, 285 Kan. 158, 164-165, 169 P.3d 1096 (2007)(Imposing an "arguably inconsistent" voluntary intoxication defense on defendant who was proceeding under mental disease or defect defense would deny defendant meaningful opportunity to present his theory of defense).

The Kansas Supreme Court's decision rests in part on state law, and this Court normally "defer[s] to the decisions of state courts on issues of state law..." Bush v. Gore, 531 U.S. 98, 112 (2000)(concurring opinion of Chief Justice Rehnquist, joined by Justice Scalia and Justice Thomas). This Court has held that state courts are the ultimate expositors of state law and that it is bound by their constructions except in extreme circumstances. Mullaney v. Wilbur, 491 U.S. 684, 691 (1975).

Additionally, this Court has held that the individual states are generally free to craft their own legislation for dealing with criminal prosecutions of the mentally ill. In Clark v. Arizona, 548 U.S. 735 (2006), this Court determined that due process did not prohibit the state of Arizona from narrowing its insanity test, from the traditional *M'Naughten* standard to an abbreviated form which applies only to the defendant who, due to a mental disease or defect, did not know that his act was wrong. 548 U.S. 747-749. In holding that the Arizona legislation did not offend due process, this Court found that the *M'Naughten* formula was not a fundamental principle "so as to limit the traditional recognition of a State's capacity to define crimes and defenses." 548 U.S. 749.

The Petitioner asserts as well that the decision of the Kansas Supreme Court conflicts with the decisions of federal circuit courts in United States v. Curtis, 328 F.3d 141 (4th Cir. 2003); Schneider v. Lynaugh, 835 F.2d 570 (5th Cir. 1988); and United States v. Halbert, 712 F.2d 388 (Cal. 1983). However, the decision in this case can be reconciled with Curtis and Halbert. Both those cases involve federal prosecutions under federal law, and the federal rules of criminal procedure.

Under federal law, the traditional *M'Naughten* standard provides a potential defense for those suffering from mental disease or defect. This provides a broader defense than Kansas law:

> **(a) Affirmative defense.**--It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.
>
> **(b) Burden of proof.**--The defendant has the burden of proving the defense of insanity by clear and convincing evidence.

18 U.S.C.A. § 17.

The corresponding procedural rules likewise provide for notice and discovery in a broader set of circumstances:

> **(a) Notice of an Insanity Defense.** A defendant who intends to assert a defense of insanity at the time of the alleged offense must so notify an attorney for the government in writing within the time provided for filing a pretrial motion, or at any later time the court sets, and file a copy of the notice with the clerk. A defendant who fails to do so cannot rely on an insanity defense. The court may, for good cause, allow the defendant to file the notice late, grant additional trial-preparation time, or make other appropriate orders.
>
> **(b) Notice of Expert Evidence of a Mental Condition.** If a defendant intends to introduce expert evidence relating to a mental disease or defect **or any other mental condition of the defendant** bearing on either (1) the issue of guilt or (2) the issue of punishment in a capital case, the defendant must–within the time provided for filing a pretrial motion or at any later time the court sets–notify an attorney for the government in writing of this intention and file a copy of the notice with the clerk. The court may, for good cause, allow the defendant to file the notice late, grant the parties additional trial-preparation time, or make other appropriate orders.

Federal Rules of Criminal Procedure, Rule 12.2. (emphasis added).

Under subsection (c)(1)(B) of that statute, the prosecution may then request, and the court order, an examination of the defendant. Under the federal rules, therefore, which require notice of "any other mental condition of the defendant," Mr. Cheever was required to give notice that he would introduce evidence regarding his voluntary intoxication, because it was a mental condition bearing on his guilt, even though it did not constitute a mental disease or defect.

Under Kansas law, the mental disease or defect defense is more narrow, as are the corresponding procedural rules.

Schneider v. Lynaugh, presents a different situation, involving a state prosecution in which the reviewing court approved the admission of psychiatric testimony from the competency evaluation, during a sentencing proceeding, to rebut the testimony of drug treatment counselors that the defendant was capable of rehabilitation. 835 F.2d 571. It is

respectfully submitted that the Schneider case stretches the holding of Buchanan beyond recognition, as none of the counselors were psychologists or psychiatrists, none of them offered an opinion regarding insanity or diminished capacity or any mental disease or defect. The Schneider court opined that the defendant had put his mental state at issue with psychological evidence, despite the fact that none of the witnesses professed to be psychologists, and did not attempt to offer evidence of any psychological condition. Rather, they testified that they believed he was sincere in his desire to reform. 835 F.2d 575 -577. This was not a holding required by Buchanan, and Mr. Cheever asserts that the Kansas Supreme Court can follow Buchanan while rejecting Schneider.

Finally, the petitioner argues that, contrary to the Kansas Supreme Court's factual finding, Mr. Cheever's expert witness relied on Dr. Welner's evaluation in reaching his opinion and that therefore, the State should have been allowed to call Dr. Welner in rebuttal. The petitioner claims that defense counsel "stipulated" that Dr. Evans relied on Dr. Welner's report. (Petition, page 28). That is not the case. The prosecutor, when arguing that Dr. Welner should be allowed to testify, misrepresented to the court that Dr. Evans testified that he relied on Dr. Welner's report. Defense counsel compounded the error by agreeing with the prosecutor:

> MR. DISNEY: And their expert that just testified relied upon Welner's report. He testified, "I relied upon Welner's report," and this is Welner.
>
> THE COURT: So Dr. Evans, who just testified, relied to a certain extent on Dr. Welner's report?
>
> MR. EVANS: That's true, he did.
>
> MR. DISNEY: Yes.

(Transcript of Jury Trial, Volume 5, Appellate Volume 27, p. 61).

Contrary to the prosecutor's assertion, Dr. Evans made no mention of Dr. Welner in his testimony during direct examination. He testified, during cross-examination, that he did *not* view the video of Dr. Welner's interview with Scott and that he had *not* read a transcript of the interview. (Transcript of Jury Trial, Volume 5, Appellate Volume 27, p. 30). He reviewed a neuropsychological evaluation conducted by Dr. Randall Price. (Transcript of Jury Trial, Volume 5, Appellate Volume 27, p. 35, 49). It was Dr. Price's evaluation that he used in forming his own opinions. (Transcript of Jury Trial, Volume 5, Appellate Volume 27, p. 50). He testified that he *may* have seen a report that Dr. Welner prepared, but did not indicate, in any way, that he relied on it in forming his own opinion. (Transcript of Jury Trial, Volume 5, Appellate Volume 27, p. 40). The factual findings of the Kansas Supreme Court on this issue are well-supported by the record.

4. There are independent and adequate state grounds to sustain the decision of the Kansas Supreme Court.

Even if the Kansas Supreme Court erred in finding that Mr. Cheever did not waive his Fifth Amendment rights when he offered his defense of voluntary intoxication, the evidence adduced in this case went far beyond rebuttal. Dr. Welner did not confine his testimony to the effects of methamphetamine on Mr. Cheever at the time of the crime. Dr. Welner testified that the crimes in this case were committed because Mr. Cheever idolized outlaws, particularly those who engaged in fatal shoot-outs with police officers, wished to outdo other outlaws and aspired to an outlaw lifestyle. Portions of the testimony in question are reproduced in Mr. Cheever's supplement to the factual statement. The erroneous admission of that evidence would still require reversal under Kansas law.

As already noted in this brief, Mr. Cheever made this argument in the Kansas Supreme Court, but the court did not reach it. It provides an independent reason for finding that the admission of Dr. Welner's testimony requires reversal of Mr. Cheever's conviction under state law.

The trial court had initially ruled that the State could use Dr. Welner to rebut Scott's defense, but warned the prosecutor to "stay targeted on debugging the voluntary intoxication defense." (Transcript of Jury Trial, Volume 5, Appellate Volume 27, p. 61). The prosecutor then argued that he should be allowed to go beyond rebuttal and offer the State's theory of the case, through Dr. Welner: "he's going to ultimately say most of these actions can be explained by his antisocial personality, rather than by intoxication, which directly rebuts their defense." (Transcript of Jury Trial, Volume 5, Appellate Volume 27, p. 62). The defense protested that the proposed testimony would clearly be beyond the scope of their evidence. (Transcript of Jury Trial, Volume 5, Appellate Volume 27, p. 62). The court decided to allow the testimony, noting that the defense had preserved its objection. (Transcript of Jury Trial, Volume 5, Appellate Volume 27, p. 64).

Should this Court find that by offering evidence of his intoxication, Mr. Cheever waived his Fifth and Fourteenth Amendment rights to the extent required to rebut this evidence, the trial court's ruling that Dr. Welner could testify that Mr. Cheever committed these crimes because of his bad character, erroneously allowed the prosecution to go beyond proper rebuttal. An involuntary intoxication defense does not, under Kansas law, open the door to evidence of character disorders or, more simply, bad character.

Rebuttal evidence, under Kansas law, is limited to issues placed in conflict by the adverse party. State v. Drach, 268 Kan. 636, 645, 1 P.3d 864 (2000). Rebuttal evidence is

that which is presented to deny some fact an adverse party has attempted to prove or has placed in dispute. State v. Burnett, 221 Kan. 40, 43, 558 P.2d 1087 (1976). It may tend to corroborate evidence of a party who first presented evidence on the particular issue, or it may refute or deny some affirmative fact which an opposing party has attempted to prove. It may be used to explain, repel, counteract, or disprove testimony or facts introduced by or on behalf of the adverse party. State v. Willis, 240 Kan. 580, 583, 731 P.2d 287 (1987).

In Kansas, evidence of the defendant's character is not admissible unless the defendant places his character in issue by offering evidence of good character. K.S.A. 60-447(b); State v. Stokes, 215 Kan. 5, 6-7, 523 P.2d 364 (1974). Neither Mr. Cheever, nor any of his witnesses, placed his character in issue. Mr. Cheever did not offer testimony that he was law-abiding, peaceful, or non-violent. To the contrary, he admitted a history of drug abuse and law violations. This did not open the door to Dr. Welner's testimony that the crimes occurred because of Mr. Cheever's bad character.

In this case, Dr. Welner did not merely attempt to "debug" the voluntary intoxication defense. He told the jury that it was his professional opinion that Mr. Cheever shot Sheriff Samuels and shot at the other law enforcement officers because he had chosen to be an "outlaw," in other words, a criminal, and that he wanted to outdo all the other outlaws. At this point Dr. Welner was testifying to his opinion that Mr. Cheever was a bad person. His testimony, that Mr. Cheever was not sad about or preoccupied with Sheriff Samuels' death or others affected by it and that he failed to mention violence as a consequence of his use of methamphetamine, exacerbated the prejudice. He portrayed Mr. Cheever as not only a person of bad character, but a person of bad character with no remorse for his actions.

Such evidence is, under Kansas rules, inadmissible unless the defendant has placed his or her character in issue:

> Subject to K.S.A. 60-448 when a trait of a person's character is relevant as tending to prove conduct on a specified occasion, such trait may be proved in the same manner as provided by K.S.A. 60-446, except that (a) evidence of specific instances of conduct other than evidence of conviction of a crime which tends to prove the trait to be bad shall be inadmissible, and (b) **in a criminal action evidence of a trait of an accused's character as tending to prove guilt or innocence of the offense charged, (i) may not be excluded by the judge under K.S.A. 60-445 if offered by the accused to prove innocence, and (ii) if offered by the prosecution to prove guilt, may be admitted only after the accused has introduced evidence of his or her good character.**

K.S.A. 60-447 (emphasis added). See, State v. Sweat, 30 Kan.App.2d 756, Syl. ¶ 10, 48 P.3d 8 (2002)("In order for K.S.A. 60-446 and K.S.A. 60-447 to apply, a person's character or a trait of a person's character must be in issue."). Mr. Cheever testified in his defense, but did not place his character in issue by his testimony. See, State v. Stokes, 215 Kan. 5, Syl. ¶ 1, 523 P.2d 364 (1974)("A witness who testifies to such identifying biographical data as place of birth, education, address, marital status, length of residence in the community and employment history, does not through such testimony alone place his character in issue.").

As previously noted, should this Court reverse the decision of the Kansas Supreme Court, Mr. Cheever will seek further review on this issue. The Kansas Supreme Court has independent and adequate state grounds on which to find reversible error in the admission of Dr. Welner's testimony. This Court has stated that its power "is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." Herb v. Pitcairn, 324 U.S. 117, 125–126 (1945). It is likely any decision in this case on the federal

issue will not change the result of Mr. Cheever's direct appeal. This Court should decline jurisdiction.

5. The Kansas Supreme Court did not decide whether evidence from a court-ordered mental evaluation can be used to impeach the defendant's trial testimony. There is no question to adjudicate.

Finally, the petitioner argues that this case presents a question of whether statements used in a court-ordered evaluation can be used to impeach the defendant's trial testimony, asserting a division in authority. The Kansas Supreme Court did not reach that issue:

> Although not argued by the parties, we note there is conflicting federal caselaw on the question of whether a defendant's statements made during a court-ordered mental examination, while not admissible to rebut a mental-state defense, may nevertheless be used to impeach the defendant's trial testimony. Compare *United States v. Leonard*, 609 F.2d 1163 (5th Cir.1980) (construing Fed. R.Crim. Proc. 12.2[c]; defendant's statements during a court-ordered mental examination are admissible *solely* on the issue of sanity and may not be used for impeachment); and *United States v. Castenada*, 555 F.2d 605 (7th Cir.1977) (holding that statements made during court-ordered mental examination under 18 U.S.C. § 4244 (1976) that are inadmissible on the issue of guilt, are admissible for impeachment because they go to credibility, not guilt).
>
> We recognize there are compelling, but conflicting, policy rationales for the competing positions. On one hand, prohibiting use for impeachment promotes the candid conversation with the expert that is necessary to produce reliable psychiatric testimony for the government or defendant, as the case may be. 609 F.2d at 1165–66. On the other hand, allowing impeachment of a testifying defendant's inconsistent testimony "protect[s] the integrity of the fact-finding process" by preventing a defendant from " 'pervert[ing]' " the shield provided by the statute " 'into a license to use perjury by way of defense, free from the risk of confrontation with prior inconsistent utterances.' " *Castenada*, 555 F.2d at 610 (quoting *Harris v. New York*, 401 U.S. 222, 226, 91 S.Ct. 643, 28 L.Ed.2d 1 [1971]).
>
> **We conclude that under the circumstances, resolution of this issue must await another day. The important considerations that underlie this issue have not been appropriately raised, briefed, and argued.** In addition, as discussed below, the erroneous admission of Welner's testimony requires reversal and remand of the capital murder and attempted capital murder convictions. Thus, even if we were also to determine that Cheever's statements were properly admitted for impeachment, that determination would not change the outcome in this case.

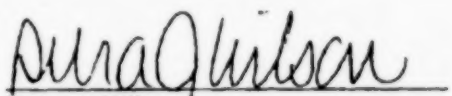
Cheever, 284 P.3d 1025.

This Court does not ordinarily "decide in the first instance issues not decided below." Zivotofsky ex rel. Zivotofsky v. Clinton 132 S.Ct. 1421, 1430 (2012), *citing* National Collegiate Athletic Assn. v. Smith, 525 U.S. 459, 470 (1999). This Court should decline jurisdiction on this issue.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,



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APPENDICES

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APPENDIX A

In the Supreme Court of the State of Kansas, State v. Cheever, No. 08-99988-S, Brief of Appellant, filed January 11, 2010, pages 114-121.

Dr. Welner's testimony exceeded proper rebuttal to Scott's evidence of voluntary intoxication.

Should this Court find that by raising a voluntary intoxication defense, Scott waived his Fifth Amendment rights to the extent necessary to rebut that defense, the district court erred when it ruled that the State could go beyond rebuttal and offer its alternative theory of the case - that Scott committed these crimes because he had an antisocial personality disorder, or, as the witness put it, he had chosen to be an outlaw. As set out earlier in the issue, the trial court initially ruled that the State could use Dr. Welner to rebut Scott's defense, but warned the prosecutor to "stay targeted on debugging the voluntary intoxication defense." (R. XXVII, 61). The prosecutor then argued that he should be allowed to go beyond rebuttal and offer the State's theory of the case, through Dr. Welner: "he's going to ultimately say most of these actions can be explained by his antisocial personality, rather than by intoxication, which directly rebuts their defense." (R. XXVII, 62). The defense protested that the proposed testimony would clearly be beyond the scope of their evidence. (R. XXVII, 62). The court decided to allow the testimony, noting that the defense had preserved its objection. (R. XXVII, 64).

While the State has the right to offer expert testimony to rebut Scott's intoxication defense, the State, under our rules, is required to do so without "the

simple, cruel expedient of forcing it from his own lips." Estelle, 451 U.S. 462, *citing* Culombe v. Connecticut, 367 U.S. 568, 581-582, 6 L.Ed.2d 1037, 81 S.Ct. 1860 (1961). See, Brown v. Butler, 876 F.2d 427, 428 -430 (5th Cir. 1989)(defendant's use of non-expert mental status witnesses to establish insanity defense did not open door to State's use of psychiatric testimony on rebuttal, use of such evidence violated the defendant's Fifth Amendment rights). As Dr. Welner testified, he had access to all the police reports, witness interviews, doctor's reports, Scott's criminal history, history regarding his substance abuse, and reports from acquaintances who had observed him both using and not using methamphetamine. (R. XXVII, 82-83). Dr. Welner had a wealth of information, independent of interviewing Scott and subjecting him to psychological testing, with which to offer rebuttal testimony.

However, should this Court find that by offering evidence of his intoxication, Scott waived his Fifth and Fourteenth Amendment rights to the extent required to rebut this evidence, the trial court's ruling that Dr. Welner could testify that Scott committed these crimes because he had an antisocial personality disorder, erroneously allowed the State to go beyond proper rebuttal. As these opinions were based on Scott's psychological testing, and his interview with Dr. Welner, the erroneous admission of these opinions violated Scott's Fifth and Fourteenth Amendment rights. As the Supreme Court noted in Powell, 492 U.S. 680, 685, f.n. 3: Nothing in *Smith*, or any other decision of this Court, suggests that a defendant opens the door to the admission of psychiatric evidence on future dangerousness by raising an insanity defense at the guilt stage of trial.

Likewise, raising an involuntary intoxication defense does not open the door to evidence of character disorders or, more simply, bad character. Rebuttal evidence is limited to issues placed in conflict by the adverse party. State v. Drach, 268 Kan. 636, 645, 1 P.3d 864 (2000). Rebuttal evidence is that which is presented to deny some fact an adverse party has attempted to prove or has placed in dispute. State v. Burnett, 221 Kan. 40, 43, 558 P.2d 1087 (1976). It may tend to corroborate evidence of a party who first presented evidence on the particular issue, or it may refute or deny some affirmative fact which an opposing party has attempted to prove. It may be used to explain, repel, counteract, or disprove testimony or facts introduced by or on behalf of the adverse party. State v. Willis, 240 Kan. 580, 583, 731 P.2d 287 (1987). A district court has broad discretion in determining the use and extent of relevant evidence in rebuttal. The court's ruling will not be reversed absent an abuse of that discretion which unduly prejudices the defendant. Generally, the admission of rebuttal evidence is not erroneous if it is intended to contradict facts put into evidence during the defense's case. State v. Cosby, 285 Kan. 230, 250, 169 P.3d 1128 (2007).

Evidence of the defendant's character is not admissible unless the defendant places his character in issue by offering evidence of good character. K.S.A. 60-447(b); State v. Stokes, 215 Kan. 5, 6-7, 523 P.2d 364 (1974).Neither Scott, nor any of his witnesses, placed Scott's character in issue. Scott did not offer testimony that he was law-abiding, peaceful, or non-violent. To the contrary, Scott admitted a history of drug abuse and law violations. This did not open the door to Dr. Welner's testimony that the crimes occurred because of Scott's bad character.

The New Jersey Superior Court considered testimony offered by Dr. Welner, regarding the credibility and moral character of the defendant in the case of State v. Vandeweaghe, 351 N.J.Super. 467, 799 A.2d 1 (2002). As in this case, the defendant, charged with aggravated manslaughter, claimed his intoxication rendered him incapable of acting purposely or knowingly. 799 A.2d 6. A forensic psychiatrist testified, on the defendant's behalf, that on the date of the victim's death, the defendant was so overwhelmed by his alcohol intoxication that he was incapable of forming the intent to kill or to cause serious bodily injury. He further stated that defendant suffered from long-standing and severe alcohol abuse and related medical problems. That doctor had reviewed Dr. Welner's report and, in anticipation of the State'e evidence, testified that he disagreed with his conclusions, including Welner's conclusion that the defendant had antisocial personality disorder. 799 A.2d 6.

The trial court allowed Dr. Welner to testify regarding his diagnosis. The court also allowed him to testify as to hearsay statements that tended to establish that the defendant was a liar. The appellate court reversed because of the inadmissible hearsay. 799 A.2d 7-9.

The State had argued that because the first doctor had criticized Dr. Welner's conclusions, he opened the door to allow Welner to testify in rebuttal. 799 A.2d 10. The Court disagreed, stating it was questionable whether Welner's conclusion, that the defendant suffered from antisocial personality disorder, was admissible:

> Defendant offered the expert opinion of Glass to support his contention that his mental faculties were so prostrated by the ingestion of alcohol that he was incapable of forming a purposeful or knowing state of mind. "Intoxication does not, in itself, constitute mental disease" entitling a defendant to raise the

> defenses of insanity or diminished capacity. *N.J.S.A.* 2C:2-8(c). **Because defendant did not offer Glass to give an opinion that he was suffering from a mental disease or defect, Welner's opinion that defendant suffered from antisocial personality disorder was irrelevant or, at the most, was of only minimal relevance.**

799 A.2d 10 (emphasis added).

The New Jersey Supreme Court reviewed this case on the State's request and approved of the lower court's reasoning regarding the hearsay. Additionally, the court held that Dr. Welner's testimony regarding antisocial personality disorder was inadmissible and that it was so prejudicial, its admission required reversal. State v. Vandeweaghe, 177 N.J. 229, 827 A.2d 1028, 1029-1030 (2003).

In the case of State v. Miner, 657 S.W.2d 332 (Mo.App. E.D. 1983), the Missouri appellate court reversed the defendant's conviction for first degree assault under similar circumstances. The defendant was relying on an intoxication defense, arguing that he did not have the mental state required for first degree assault. He presented testimony from a psychiatrist regarding his chronic alcohol problems and history of blackouts. The psychiatrist testified that if he in fact consumed the amount of alcohol that he said he did on the day of the assault, he was probably suffering the effects of a blackout. 657 S.W.2d 333. In rebuttal, the State's psychiatrist testified that the defendant had an antisocial personality disorder, and mentioned, during his testimony, one of the defendant's juvenile arrests. The court reversed due to the testimony regarding the arrest, and commented, "We fail to see from the record how defendant's personality was relevant to the issue of whether or not defendant was in an intoxicated condition at the time he committed the offense." 657 S.W.2d 333.

After his conviction was reversed, he was tried and convicted again. State v. Miner, 703 S.W.2d 73, 73 -74 (Mo.App. E.D. 1985). He again raised an intoxication defense, and offered expert testimony in support of the defense. Once again, the State's expert testified that the defendant had and antisocial personality disorder (although avoiding any testimony regarding juvenile convictions). 703 S.W.2d 74-75. The appellate court held:

> We are compelled to find the court erred in permitting evidence attacking defendant's character. It is impermissible for the state to attack the character of the defendant unless he first injects the issue by offering evidence of his good character. *State v. Thurman*, 521 S.W.2d 773, 777 (Mo.App.1975). Defendant's evidence of alcohol dependency is obviously not evidence of good character. In addition, this issue was not an open question on remand because it was decided in the first appeal.

703 S.W.2d 75.

In this case, Dr. Welner did not merely attempt to "debug" Scott's voluntary intoxication defense. He told the jury that it was his professional opinion that Scott shot Sheriff Samuels and shot at the other law enforcement officers because he had chosen to be an "outlaw," in other words, a criminal, and that he wanted to outdo all the other outlaws. At this point Dr. Welner was testifying to his diagnosis of Scott as a person with a bad character. His testimony that Scott was not sad about or preoccupied with Sheriff Samuels' death or others affected by it and that he failed to mention violence as a consequence of his use of methamphetamine exacerbated the prejudice. He portrayed Scott as not only a person of bad character, but a remorseless person of bad character. (R. XXVII, 86, 106-107).

Such evidence is, under our rules, inadmissible unless the defendant has placed his or her character in issue:

> Subject to K.S.A. 60-448 when a trait of a person's character is relevant as tending to prove conduct on a specified occasion, such trait may be proved in the same manner as provided by K.S.A. 60-446, except that (a) evidence of specific instances of conduct other than evidence of conviction of a crime which tends to prove the trait to be bad shall be inadmissible, and (b) **in a criminal action evidence of a trait of an accused's character as tending to prove guilt or innocence of the offense charged, (i) may not be excluded by the judge under K.S.A. 60-445 if offered by the accused to prove innocence, and (ii) if offered by the prosecution to prove guilt, may be admitted only after the accused has introduced evidence of his or her good character.**

K.S.A. 60-447 (emphasis added).

See, State v. Sweat, 30 Kan.App.2d 756, Syl. ¶ 10, 48 P.3d 8 (2002)("In order for K.S.A. 60-446 and K.S.A. 60-447 to apply, a person's character or a trait of a person's character must be in issue."). Scott testified in his defense, but did not place his character in issue by his testimony. See, State v. Stokes, 215 Kan. 5, Syl. ¶ 1, 523 P.2d 364 (1974)("A witness who testifies to such identifying biographical data as place of birth, education, address, marital status, length of residence in the community and employment history, does not through such testimony alone place his character in issue.").

While Scott does not concede any of Dr. Welner's testimony that was based on his interview and evaluation of Scott was admissible in this proceeding, should this Court find that it was admissible to rebut the voluntary intoxication defense, Dr. Welner's testimony regarding Scott's character and lack of remorse exceeded any permissible bounds and should not have been admitted.

APPENDIX B

In the Supreme Court of the State of Kansas, State v. Cheever, No. 08-99988-S, Brief of Appellant, filed January 11, 2010, pages 42-130.

Issue No. I: K.S.A. 21-3439(a)(5) is unconstitutional, it violates the Eighth Amendment to the United States Constitution and Section Nine of the Kansas Constitution Bill of Rights as it fails to properly narrow the class of persons eligible for the death penalty. Mr. Cheever's sentence of death, obtained under that statute, must be vacated.

Introduction and Standard of Review

The Eighth Amendment to the United States Constitution requires that punishment be proportionate to the crime and that a capital sentencing scheme genuinely narrow the class of persons eligible for the death penalty and reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder. Section Nine of the Kansas Constitution Bill of Rights provide similar protection.

The narrowing function required by these constitutional provisions may be performed at either the guilt or the penalty phase of a capital trial. In Kansas, the narrowing function is performed at the guilt phase. The Kansas capital murder statute narrows the class of offenders eligible for the death penalty by defining the crime of capital murder as intentional, premeditated first degree murder along with one of several specific, statutorily defined aggravating circumstances.

Scott was convicted of capital murder under the aggravating circumstance that the victim was a law enforcement officer, subsection (a)(5) of the capital murder statute. Our statute does not limit the application of this subsection to situations where the victim is killed while performing, or because of, his or her duties as a law enforcement officer. Thus, a defendant may be convicted of capital murder and eligible for the death penalty for killing a law enforcement officer whether or not the killing was related to the victim's law enforcement duties.

Subsection (a)(5) of the capital murder statute fails to provide a meaningful basis for distinguishing cases in which the death penalty is imposed from those in which it is not. Therefore, it violates the provisions of the Eighth Amendment to the United States Constitution, as well as Section Nine of the Kansas Constitution Bill of Rights, which require that a death penalty scheme reasonably justify the imposition of a more severe penalty on a particular defendant compared to others convicted of murder.

When the application of a statute is challenged on constitutional grounds, this Court exercises an unlimited, de novo standard of review. State v. Cook, 286 Kan. 766, 768, 187 P.3d 1283 (2008).

Factual and Procedural Background

Scott was charged with capital murder and attempted capital murder under the provisions of K.S.A. 21-3439(a)(5). (R. I, 8-10, 20-25). That statute provides:

> (a) Capital murder is the ... (5) intentional and premeditated murder of a law enforcement officer, as defined in K.S.A. 21-3110 and amendments thereto...

K.S.A. 21-3110(10) provides:

"Law enforcement officer" means:

> (a) Any person who by virtue of such person's office or public employment is vested by law with a duty to maintain public order or to make arrests for crimes, whether that duty extends to all crimes or is limited to specific crimes;
>
> (b) any officer of the Kansas department of corrections or, for the purposes of K.S.A. 21-3409, 21-3411 and 21-3415, and amendments thereto, any employee of the Kansas department of corrections; or
>
> (c) any university police officer or campus police officer, as defined in K.S.A. 22-2401a, and amendments thereto.

The instructions regarding the capital murder charge informed the jury that to find Scott guilty of that crime, it must find:

> 1. That the defendant intentionally killed Matthew Samuels;
>
> 2. That such killing was done with premeditation;
>
> 3. That Matthew Samuels was a law enforcement officer;
>
> 4. That this act occurred on or about the 19th day of January, 2005, in Greenwood County, Kansas.

(R. IV, 68).

The instructions regarding the charges of attempted capital murder followed a similar format. (R. IV, 72, 76, 80, 84).

The trial court also defined law enforcement officer for the jury:

> The term "law enforcement officer" means any person who by virtue of such person's office or public employment is vested by law with a duty to maintain public order or to make arrests for crimes, whether that duty extends to all crimes or is limited to specific crimes, or any officer of the Kansas department of corrections.

(R. IV, 91).

As the prosecutor explained to the jury in closing:

> So if you intentionally kill with premeditation a law enforcement officer, it's capital murder. If you intentionally kill with premeditation a civilian, someone on the street, it's not capital murder; it's simply first-degree murder.

(R. XXVIII, 38).

Scott did not challenge the constitutionality of K.S.A. 21-3439(a)(5) in the district court. Nor did he object to the instructions defining capital murder. (R. XXVII, 138).

This Court may consider this issue for the first time on appeal.

(This section, beginning at page 45 of the brief, ending on page 46, omitted)

Constitutional Requirements for Death Penalty Legislation

In order for a capital sentencing scheme to pass constitutional muster, it must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877, 77 L.Ed.2d 235, 103 S.Ct. 2733 (1983); State v. Scott, 286 Kan. 54, 59, Syl. ¶ 35, 183 P.3d 801 (2008). States must properly establish a threshold below which the penalty cannot be imposed. To ensure that this threshold is met, the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold. Romano v. Oklahoma, 512 U.S. 1, 6-7, 129 L.Ed.2d 1, 114 S.Ct. 2004 (1994) *citing* McCleskey v. Kemp, 481 U.S. 279, 305, 95 L.Ed.2d 262, 107 S.Ct. 1756 (1987). See, Godfrey v. Georgia, 446 U.S. 420, 427-28, 64 L.Ed.2d 398, 100 S.Ct. 1759 (1980) (under the Eighth Amendment, capital sentencing scheme must provide a meaningful basis for distinguishing the few cases in which the penalty is imposed from the many cases in which it is not); and Arave v. Creech, 507 U.S. 463, 474, 123 L.Ed.2d 188, 113 S.Ct. 1534 (1993)("When the purpose of a statutory aggravating circumstance is to enable

the sentencer to distinguish those who deserve capital punishment from those who do not, the circumstance must provide a principled basis for doing so.")

The Eighth Amendment proscribes "all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive." Kennedy v. Louisiana, ___ U.S. ___, 171 L.Ed.2d 525, 128 S.Ct. 2641, 2649 (2008), citing Atkins v. Virginia, 536 U.S 304, 311, 153 L.Ed.2d 335, 122 S.Ct. 2242 2002). The Eighth Amendment's protection against excessive or cruel and unusual punishments flows from the basic "precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense." Kennedy, 128 S.Ct. 2649 citing Weems v. United States, 217 U.S. 349, 367, 54 L.Ed. 793, 30 S.Ct. 544 (1910).

> For these reasons we have explained that capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution.... Though the death penalty is not invariably unconstitutional, ...the Court insists upon confining the instances in which the punishment can be imposed...

Kennedy, 128 S.Ct. 2650 (internal citations and quotations omitted).

Section Nine of the Kansas Constitution Bill of Rights is our state constitutional provision that corresponds to the Eighth Amendment. Section Nine provides that no cruel or unusual punishment can be inflicted by the State, and is directed primarily at the kind of punishment imposed. State v. McCloud, 257 Kan. 1, Syl. ¶ 1, 891 P.2d 324 (1995). This Court has generally construed state constitutional provisions in a manner consistent with federal interpretation of their federal counterparts. State v. Spain, 269 Kan. 54, 59, 4 P.3d 621 (2000); State v. Scott, 265 Kan. 1, 5, 961 P.2d 667 (1998); Murphy v. Nelson, 260 Kan. 589, 597, 921 P.2d 1225 (1996); State v. Morris, 255 Kan., 964, 981, 880 P.2d 1244 (1994).

This Court has never, however, relinquished its position as the "ultimate expositor of state law" with "the authority to interpret our state constitutional provisions independent of federal interpretation of corresponding provisions." State v. Scott, 286 Kan. 54, 91, 183 P.3d 801 (2008). This Court has specifically reserved its right and duty to consider the proportionality of a criminal sentence under Section Nine. "In such a circumstance, we are free to further consider the historical record and decide whether § 9 should be interpreted in a manner which deviates from that given to the Eighth Amendment by the United States Supreme Court." 286 Kan. 94.

Kansas' Provisions for Performing the Eighth Amendment Narrowing Function

In Tuilaepa v. California, 512 U.S. 967, 971, 129 L.Ed.2d 750, 114 S.Ct. 2630(1994) the Supreme Court noted, "Our capital punishment cases under the Eighth Amendment address two different aspects of the capital decisionmaking process: the eligibility decision and the selection decision. To be eligible for the death penalty, the defendant must be convicted of a crime for which the death penalty is a proportionate punishment. ... To render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase." See, Lowenfield v. Phelps, 484 U.S. 231, 244-45, 98 L.Ed.2d 568, 108 S.Ct. 546 (1988)(The aggravating circumstance may be contained in the definition of the crime or in a separate sentencing factor or in both) and Loving v. United States, 517 U.S. 748, 755, 135 L.Ed.2d 36, 116 S.Ct. 1737 (1996)("Some schemes accomplish that narrowing by requiring that the sentencer find at least one aggravating circumstance.

The narrowing may also be achieved, however, in the definition of the capital offense, in which circumstance the requirement that the sentencer 'find the existence of the aggravating circumstance in addition is no part of the constitutionally required narrowing process'.").

In Scott, this Court approved the use of a penalty-phase aggravating factor which duplicated one of the elements of the crime of capital murder because in our capital sentencing scheme, like the one in issue in Lowenfield, the jury performs the narrowing function at the guilt phase. Scott, 286 Kan. 108-110.

> In *Lowenfield*, the Supreme Court explained: "Here, the 'narrowing function' was performed by the jury at the guilt phase when it found defendant guilty of three counts of murder under the provision that 'the offender has a specific intent to kill or to inflict great bodily harm upon more than one person.' The fact that the sentencing jury is also required to find the existence of an aggravating circumstance in addition is no part of the constitutionally required narrowing process, and so *the fact that the aggravating circumstance duplicated one of the elements of the crime does not make this sentence constitutionally infirm.* There is no question but that the Louisiana scheme narrows the class of death-eligible murderers and then at the sentencing phase allows for the consideration of mitigating circumstances and the exercise of discretion. The Constitution requires no more.

286 Kan. 108-109 (emphasis in original).

See, Kansas v. Marsh, 548 U.S. 163, 175-176, 165 L.Ed.2d 429, 126 S.Ct. 2516 (2006)("Kansas' procedure narrows the universe of death-eligible defendants consistent with Eighth Amendment requirements. Under Kansas law, imposition of the death penalty is an *option* only after a defendant is convicted of capital murder, which requires that one or more specific elements beyond intentional premeditated murder be found."); Sonnier v. Quarterman, 476 F.3d 349, 364-365 (5th Cir. 2007)(recognizing the Texas capital sentencing scheme, like the one upheld by the

Supreme Court in Kansas v. Marsh, performs the constitutionally-required narrowing function through its statutory definition of capital murder, then further narrows the category of those eligible for the death penalty by requiring an additional fact finding at the penalty phase).

Subsection (a)(5) does not meet constitutional requirements

Because the Kansas death penalty scheme performs the necessary narrowing function at the guilt phase, through the definition of capital murder, the question is whether making all premeditated, intentional murders of persons employed as law enforcement officers, without a requirement that the murder be duty-related, provides a principled basis for determining which defendants convicted of premeditated first degree murder deserve the death penalty. Scott contends that it does not.

In Roberts v. Louisiana, 431 U.S. 633, 636, 52 L.Ed.2d 637, 97 S.Ct. 1993 (1977) our Supreme Court stated, "To be sure, the fact that the murder victim was a peace officer ***performing his regular duties*** may be regarded as an aggravating circumstance."(emphasis added). The question of whether the fact that the murder victim was a peace officer, standing alone, may be regarded as an aggravating factor has not been before that Court. This is probably because Kansas is the only death penalty state with such a broad provision. The limited case law on this subject suggests that the answer must be "no."

In the case of State v. Reynolds, 235 Neb. 662, 457 N.W.2d 405 (1990), *disapproved on other grounds,* State v. Messersmith, 238 Neb. 924, 473 N.W.2d 83 (1991), the defendant shot and killed a uniformed police officer who came to his

apartment in response to 911 calls. 457 N.W.2d 410-411. He was convicted of murder in the first degree and a sentencing panel sentenced him to life imprisonment. 457 N.W.2d 408. The State appealed the life sentence, arguing that it was too lenient. 457 N.W.2d 408. The prosecution had sought the death penalty, arguing that it had proven the aggravating factor, "The victim was a law enforcement officer or a public servant having custody of the offender or another." 457 N.W.2d 425.

The sentencing panel had rejected this contention, it determined that the State did not prove the aggravating factor because, although the victim was a law enforcement officer, the defendant was not in his custody. 457 N.W.2d 425. The State urged the Nebraska Supreme Court to find that the custody requirement only applied to public servants, and that the aggravating factor could be established by proof that the victim was a law enforcement officer. The Nebraska Supreme Court declined to do so and found that such an interpretation would be constitutionally questionable:

> If the State's interpretation prevails, then killing at any time any person who happens to be a law enforcement officer justifies application of § 29-2523(1)(g) as an aggravating circumstance for imposition of the death penalty. In its present form, § 29-2523(1)(g) raises all-too-obvious questions: Must the officer, at the time of the officer's death, be in the performance of an official duty? Must the defendant have known, or should the defendant have reasonably known, that the victim was a law enforcement officer? Without answers to the preceding questions, and perhaps answers to other questions stemming from the absence of definitive statutory language, **the State's broad and virtually unrestricted interpretation of § 29-2523(1)(g) may likely raise serious constitutional issues regarding vagueness in § 29-2523(1)(g) or equal protection inherent in the dichotomy of two homicide victims when one victim is a law enforcement officer who is not performing an official duty at the time of death, while the other victim is not a law**

> **enforcement officer.** There is no legal distinction between the homicide victims reflected in the dichotomy. Yet, in the first part of the dichotomy, one is exposed to the death penalty on account of § 29-2523(1)(g), while, in the second part of the dichotomy, one is not exposed to the death penalty by virtue of § 29-2523(1)(g).

457 N.W.2d 426-427(emphasis added).

The Court noted, that:

> Of the 36 states in which the death penalty is authorized as a punishment for first degree murder, 27 states have chosen to fashion a statutory aggravating circumstance similar to § 29-2523(1)(g), but, unlike Nebraska, the 27 other states have provided a reasonably precise definition, characterization, or description of the law enforcement officer as a victim whose death may be the basis for imposition of the death penalty
>
> ...
>
> We point out the statutes of other states only to show that killing a law enforcement officer **while the officer is lawfully performing an official duty** is a fairly common subject for an aggravating circumstance in conjunction with imposition of the death penalty. An aggravating circumstance of such nature has an obvious purpose: "There is a special interest in affording protection to [those] public servants who regularly must risk their lives in order to guard the safety of other persons and property." *Roberts v. Louisiana,* 431 U.S. 633, 636, 97 S.Ct. 1993, 1995, 52 L.Ed.2d 637 (1977). In other words, as a result of a law enforcement officer's service to the public, many states have determined that murder of a law enforcement officer **during the officer's performance of an official duty** is an aggravating circumstance in determining whether the death penalty should be imposed.

457 N.W.2d 427-428 (emphasis added).

The Court also rejected the State's suggestion that it supply the necessary but omitted definition, instead finding that the sentencing panel's interpretation was correct under the circumstances and "preserves the statute from constitutional suspicion." 457 N.W.2d 428.

The Nebraska statutes have been amended since this decision. Currently, murder in the first degree may be punished by the death penalty, if the State proves at least one statutory aggravating circumstance. Neb.Rev.St. § 28-303; Neb.Rev.St. § 29-2520(f). One of those aggravating circumstances is: "The victim was a law enforcement officer **engaged in the lawful performance of his or her official duties as a law enforcement officer** and the offender knew or reasonably should have known that the victim was a law enforcement officer." Neb.Rev.St. § 29-2523(1)(i)(emphasis added).

Our Kansas statute presents the dichotomy described by the Nebraska Supreme Court. For example, under our statute, if the defendant kills his brother-in-law intentionally and with premeditation, after a social event where insults were exchanged, he is eligible for the death penalty if his brother-in-law was a police officer. However, he is not eligible for the death penalty under the same circumstances if his brother-in-law was an architect.

In Martin v. Commonwealth, 221 Va. 436, 271 S.E.2d 123 (1980), the defendant challenged, as unconstitutionally vague, a Virginia statute allowing imposition of the death penalty for a killing a law enforcement officer when the killing was for the purpose of interfering with the performance of the officer's official duties. The defendant argued that the statute was void for vagueness because any time a police officer was killed, the killing would prevent the officer from performing his duties. 221 Va. 440.

In rejecting this claim the Virginia Supreme Court stated, "We do not believe that Code s 18.2-31(f) suffers unconstitutional vagueness. **The section does not permit imposition of the death penalty just because a murder victim happens to be a law enforcement officer.** By its clear terms, the section makes purpose a key factor in any prosecution thereunder; the death penalty may be imposed only where the Commonwealth proves beyond a reasonable doubt that the killing of a law enforcement officer is accompanied by the purpose of interfering with the performance of his official duties." 221 Va. 440.

Our statute does exactly what the Virginia statute does not. It allows imposition of the death penalty just because the murder victim happens to be a police officer.

Kentucky law authorizes death for capital offenses, which includes all intentional murders, except those committed under extreme emotional disturbance. K.R.S. § 532.030(1); K.R.S. § 507.020. The jury must find a aggravating factor to impose the death penalty, among those is:

> The offender's act of killing was intentional and the victim was a state or local public official or police officer, sheriff, or deputy sheriff **engaged at the time of the act in the lawful performance of his duties**.

K.R.S. § 532.025(2)(a)(7)(emphasis added).

The Kentucky Supreme Court commented, regarding this factor, "...the KRS 532.025(2)(a)(7) aggravating factor is 'specific and narrow.' ... The statute does not require simply that the victim was a law enforcement officer. The qualifying language that follows the identification of the victim requires that the victim was also "engaged at the time of the act in the lawful performance of his duties." We cannot read the

statute so broadly as to reduce this requirement to such an extent that an aggravating factor instruction is allowed whenever an offender kills a sheriff or other law enforcement officer." White v. Commonwealth, 178 S.W.3d 470, 480 (Ky. 2005).

In Ohio, the purposeful murder of a law enforcement officer whom the offender knows or has reasonable cause to know is a law enforcement officer is aggravated murder when: (1) The victim, at the time of the commission of the offense, is engaged in the victim's duties; or (2) It is the offender's specific purpose to kill a law enforcement officer. R.C. 2903.01(E). Ohio law authorizes the death penalty for aggravated murder. R.C. 2929.02(A). This is also an aggravating circumstance can justify the imposition of the death penalty. R.C. 2929.04(A)(6). The Ohio Supreme Court approved this duplication because, as in Kansas, the narrowing function occurs in the guilt phase. State v. Bryan, 101 Ohio St.3d 272, 804 N.E.2d 433, 449 (2004). "R.C. 2903.01(E) **narrows** the class of persons eligible for the death penalty **by focusing on the purposeful murder of a law enforcement officer or murder occurring while the law enforcement officer is engaged in his or her duties.**" 101 Ohio St.3d 279 (emphasis added).

Other Jurisdictions

In Kennedy v. Lousiana, the United States Supreme Court determined that imposing a sentence of death for raping, but not killing, a child would violate the Eighth and Fourteenth Amendments. This decision was based on both the Court's own independent judgment, and a consensus among death penalty jurisdictions. 128 S.Ct. 2650-2651. The Court stated that it was guided by the "objective indicia of

society's standards, as expressed in legislative enactments and state practice with respect to executions." 128 S.Ct. 2650, citing Roper v. Simmons, 543 U.S. 551, 563, 161 L.Ed.2d 1, 125 S.Ct. 1183 (2005).

Currently, thirty five states have laws authorizing the death penalty. Death Penalty Information Center, http://www.deathpenaltyinfo.org. All thirty five states provide, in some way, that the victim's employment as a law enforcement officer can be grounds for imposition of the death penalty. Thirty four of those states require more, that the victim be killed in the performance of his or her duties, or that the victim be killed because of those duties. The consensus among these death penalty states is that victim's employment as a law enforcement officer is a valid element or aggravating factor justifying the imposition of the death penalty, when the murder is connected to the victim's duties as a law enforcement officer. Kansas stands alone in making the intentional premeditated killing of a law enforcement officer, under any circumstances, a death-eligible offense.

(This section, setting out the laws in the death penalty jurisdictions, beginning on page 57 of the brief and ending on page70, omitted.)

Argument

Under our statute, a defendant who kills, intentionally and with premeditation, his neighbor, because of a conflict over their children, is eligible for the death penalty if that neighbor happens to be a law enforcement officer, but not if the neighbor is a kindergarten teacher. A defendant who kills a spouse over infidelity is eligible for the death penalty if the spouse happens to be a law enforcement officer, but not if the

spouse is house painter. Without a duty requirement, our statute has created an arbitrary classification for determining who should face the ultimate sanction for their crimes. Making any premeditated murder of a law enforcement officer, regardless of its connection to the victim's employment, a capital crime, is as arbitrary as making the murder of a person with blue eyes a capital offense.

Without a duty requirement, subsection (a)(5) does not "reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 877. The victim's employment, standing alone, does not provide a meaningful basis for distinguishing cases in which the death penalty is imposed, from those in which it is not. See, Godfrey v. Georgia, 446 U.S. 427-28.

One of the grounds for the decision in Kennedy v. Louisiana was the consensus among death penalty jurisdictions. A stronger consensus appears in this case, Kansas is a minority of one. The Kennedy decision also emphasized proportionality of punishment under the Eighth Amendment, and proportionality is also an important aspect of the protections afforded by Section Nine of the Kansas Constitution Bill of Rights. In addition to failing to narrow, in a principled manner, the class of defendants eligible for the death penalty, subsection (a)(5) creates the risk of disproportionate punishment, the dichotomy described by the Nebraska Supreme Court State v. Reynolds, 457 N.W.2d 426-427.

Our legislature has enacted other statutes that impose more severe penalties for crimes committed against law enforcement officers than against, for example,

kindergarten teachers. Assault is a class C person misdemeanor, while assault of a law enforcement officer is a class A person misdemeanor. K.S.A. 21-3408; K.S.A. 21-3409. Aggravated Assault is a severity level 7 person felony, while aggravated assault of a law enforcement officer is a level 6 person felony. K.S.A. 21-3410; K.S.A. 21-3411. Battery is a class B person misdemeanor, while battery against a law enforcement officer is a class A person misdemeanor or a level 7 person felony. K.S.A. 21-3412; K.S.A. 21-3413(a)(1)(2) and (b). Aggravated battery is either a level 8, 7, 5 or 4 person felony and aggravated battery against a law enforcement officer is either a level 4 or 3 person felony. K.S.A. 21-3414; K.S.A. 21-3415. However, in all those instances, the legislature has limited the application of those statutes to situations in which the officer is engaged in the officer's duty. The legislature recognized that absent a connection between the crime and the officer's duties, there is no valid justification for the imposition of harsher penalties. Absent that connection, harsher penalties for crimes committed against law enforcement officers are disproportionate.

This Court has held:

> The constitutionality of a statute is presumed. All doubts must be resolved in favor of its validity, and before the act may be stricken down it must clearly appear the statute violates the constitution. In determining constitutionality, it is the court's duty to uphold a statute under attack rather than defeat it. If there is any reasonable way to construe the statute as constitutionally valid, that should be done. A statute should not be stricken down unless the infringement of the superior law is clear beyond substantial doubt.

State v. Scott, 286 Kan. 54, 57, Syl. ¶ 27, 183 P.3d 801 (2008).

In this case, the constitutional infringement is clear. Subsection (a)(5) fails to perform the principled narrowing function required by the federal and state constitutions, it fails to rationally divide those defendants whose crime warrants the ultimate sanction from those who do not. Instead, (a)(5) creates an arbitrary subset of first degree murders eligible for the death penalty. Because it does not limit death penalty eligibility to defendants who kill law enforcement officers who are acting in the line of duty, or because of the officer's duty, K.S.A. 21-3439(a)(5) fails to meet the requirements of the Eighth Amendment to the United States Constitution, as well as the requirements of Section Nine of the Kansas Constitution Bill of Rights.

The only way for this Court to construe this statute in a way consistent with constitutional requirements would be to add words to the statute that do not appear in it. As explained next, such a step would be improper.

This court cannot save the unconstitutional provisions of K.S.A. 21-3439(a)(5) by applying a limiting construction.

(This section, beginning on page 73 of the brief and ending on page 84, omitted.)

Scott has standing to raise this issue

(This section, beginning on page 84 of the brief and ending on page 85, omitted.)

Conclusion

The United States Supreme Court observed in Godfrey v. Georgia, "[I]if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates 'standardless [sentencing] discretion.'"

446 U.S. 428. Our statutory provisions that render a defendant eligible for the death penalty anytime he or she commits the intentional, premeditated murder of a law enforcement officer fails to meet the requirements of the Eighth Amendment and Section Nine of the Kansas Constitution Bill of Rights, as it fails to properly narrow the class of offenders eligible for the death penalty and provides for disproportionate punishment. The sentence of death imposed on Scott pursuant to his conviction of capital murder under K.S.A. 21-3439(a)(5) must be vacated.

APPENDIX C

In the Supreme Court of the State of Kansas, State v. Cheever, No. 08-99988-S, Brief of Appellee, filed November 1, 2010, pages 22-31.

II. The trial court did not abuse its discretion in allowing the State to present Dr. Welner's testimony because (1) there was no government misconduct in obtaining Dr. Welner's evidence, (2) the testimony was not used in the State's case-in-chief, but only for impeachment and rebuttal, (3) Defendant put his mental state at issue, and (4) Dr. Welner's testimony directly rebutted that of the Defense expert.

Standard of Review

Defendant attempts to characterize this claim as a constitutional issue in order to get *de novo* review. (Appellant's Brief, pp. 86-87.) However, in challenging the State's use of Dr. Welner as a rebuttal witness, Defendant never raised a constitutional challenge before the trial court. He objected on the grounds that allowing Dr. Welner to testify would somehow violate Kansas law regarding the defense of voluntary intoxication, that use of statements made to Dr. Welner constituted improper impeachment, and that Dr. Welner was an improper rebuttal witness. (R. XXVI, 120-21; XXVII, 58-64.) At no time in the court below did Defendant raise a challenge to Dr. Welner based on the Fifth and Fourteenth Amendment as he does now. It is well established that a defendant "cannot object to the introduction of evidence on one ground at trial and then assert a different ground on appeal." *State v. Engelhardt*, 280 Kan. 113, 127, 119 P.3d 1148 (2005) (citation omitted). This is true even when the alleged error involves a constitutional right. *State v. Dukes*, 290 Kan. 485, 231 P.3d 558 (2010); *State v. Richmond*, 289 Kan. 419, 429-30, 212 P.3d 165 (2009). "[T]he trial court must be provided the specific objection so it may consider as fully as possible whether the evidence should be admitted and therefore reduce the chances of reversible error." *Id.* at 561 (*quoting Richmond*, 289 Kan. at 429.)

Thus, Defendant's constitutional argument is not properly preserved for appeal and should not be considered. Overlooking the lack of a specific constitutional objection

would lead, as the *Richmond* Court noted, to the exception swallowing the rule. 289 Kan. at 429-30. Rather, this Court should only consider the objection that was raised at trial, which is that use of Dr. Welner's testimony violated Kansas statutory law and constituted improper impeachment and rebuttal. The proper standard of review for such a claim is abuse of discretion. *State v. Crosby*, 285 Kan. 230, 250, 169 P.3d 1128 (2007) ("A district judge has broad discretion in determining the use and extent of relevant evidence in rebuttal, and such a ruling will not be ground for reversal absent abuse of that discretion that unduly prejudices the defendant.").

Argument

In Defendant's federal prosecution, his defense attorneys raised a possible mental disease or defect defense and a voluntary intoxication defense. (R. XXVII, 58-59.) As a result, the federal district court ordered Defendant to be evaluated by Dr. Welner. (R. XXVII, 60.) The record is not clear, but this appears to have been done in accordance with Federal Rule of Criminal Procedure 12.2.

Defendant does not now allege that there was anything improper in the federal proceedings. He does not claim that, in the context of those proceedings, Dr. Welner's interview of him was in any way improper, nor does he argue that there was any government misconduct in the federal proceedings. Rather, the crux of Defendant's argument is that since he did nothing in the state proceedings that would have allowed Dr. Welner access to interview him, any information Dr. Welner gained during the federal prosecution should not have been admitted in the state prosecution. His argument is simply that because his state attorneys adopted a different strategy than his federal attorneys, and because the federal rules under which Dr. Welner was ordered to evaluate

him are slightly different from the state rules, he should be able to block any evidence gained by Dr. Welner, even if used only for impeachment or rebuttal. This is an untenable argument.

(A.) Because there was no government misconduct, there is no justification for exclusion of Dr. Welner's relevant evidence.

Whether viewed as a constitutional claim or otherwise, there is no basis for exclusion of Dr. Welner's testimony. The exclusion of relevant evidence obtained by the State in a criminal prosecution is a judicially created remedy designed to safeguard the rights of defendants through its deterrent effect. *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 371, 118 S.Ct. 2014, 141 L.Ed.2d 344 (1998). The "primary purpose of the exclusionary rule 'is to deter future unlawful police conduct.'" *Id.* Where there is no government misconduct, there is no basis for applying the exclusionary rule. Because there was no allegation of government misconduct here, exclusion of Dr. Welner's testimony by the trial court was not warranted.

Defendant's argument that, but for the federal prosecution, Dr. Welner (and thus the State) would not have been able to gain access to Defendant is not grounded on allegations of government misconduct. It seems to be more fairly grounded on a difference of strategy between Defendant's federal defense counsel and his state defense counsel. Apparently, his federal counsel thought a mental disease or defect defense might have been viable and raised that as a potential defense, giving rise to Dr. Welner's interview. (R. XXVII, 58; *see also* R. XXVII, 56-57 (noting prior defense counsel sought psychological testing by another expert, Dr. Price.)) When his case was returned to state court, his state defense counsel decided that a mental disease or defect defense was not a good strategy, and chose not to pursue it, thus not invoking the procedures of

K.S.A. 22-3219 which could have resulted in a similar court-ordered mental examination. But a difference in strategies between different defense attorneys does not equate to misconduct by the State.

The State recognizes, however, that the record is not entirely clear on what Defendant's federal counsel's strategy was, and it appears that Federal Rule of Criminal Procedure 12.2 is broader than state rules in that it may require notice for a voluntary intoxication defense and authorize a subsequent mental evaluation, *see United States v. Cervone*, 907 F.2d 332, 345-46 (2nd Cir. 1990), whereas K.S.A. 21-3208, which defines the parameters of intoxication as a defense under state law, does not. So it is possible that even if Defendant's federal counsel had pursued the same strategy as his state defense counsel, relying only on a voluntary intoxication defense, Dr. Welner still would have had the same court-ordered access to Defendant. But again, this does not equate to government misconduct. By all appearances the government conduct in the federal prosecution was proper within the federal rules, and differences between those rules and state rules do not transform Dr. Welner's lawful interview with Defendant into something unlawful.

Defendant's reliance on *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), is misplaced, as that case is plainly distinguishable. In *Estelle* the trial court *sua sponte* ordered a mental examination of the defendant, without the agreement of defense counsel, without a valid waiver of the defendant's constitutional rights, and the defendant did not present any evidence with respect to his mental state. Here, the court-ordered evaluation was done because of the defense decision to pursue a mental defect and/or voluntary intoxication defense, and was therefore administered with

complete knowledge of the defense. There is nothing in the record to indicate Defendant was not properly apprised of his rights, and again, there is certainly no allegation of government misconduct in obtaining the interview. And Defendant here clearly put on expert testimony regarding his mental state. Moreover, and quite significantly, in *Estelle*, the evidence was used as part of the State's case-in-chief to establish future dangerousness, whereas here, the evidence was used for impeachment and rebuttal. Thus, this case is clearly distinguishable from *Estelle*. *See Buchanan v. Kentucky*, 483 U.S. 402, 107 S.Ct. 2906, 97 L.Ed.2d 336 (1987) (distinguishing *Estelle* because defense counsel jointly requested with the prosecution a mental examination of defendant, taking the case out of the scope of the *Estelle* holding); *State v. Ji*, 251 Kan. 3, 21-24, 832 P.2d 1176 (1992) (distinguishing *Estelle* on the grounds that the defendant initiated the mental examination by filing a notice of insanity defense); *White v. Mitchell*, 431 F.3d 517, 537 (6th Cir. 2005) (distinguishing *Estelle* because defendant initiated the mental evaluation and it was used only for rebuttal purposes); *Randleman v. State*, 310 Ark. 411, 837 S.W.2d 449 (1992) (distinguishing *Estelle* because psychiatric evidence was used only for impeachment, record was silent regarding *Miranda* warnings, and latter was not raised below).

The various other cases cited by Defendant are likewise unpersuasive. In some cases, either the mental evaluation was ordered against the defendant's will, or there was evidence of some type of government coercion, violation of constitutional rights, or other misconduct not present here, or the finding of error rested on the peculiarities of other states' laws. *Gibbs v. Frank*, 387 F.3d 268 (3rd Cir. 2004) (following reversal on other grounds, defendant did not raise mental state defense in second trial, but prosecution

introduced psychiatric rebuttal testimony from first trial during its case-in-chief); *Battie v. Estelle*, 655 F.2d 692 (C.A. Tex, 1981) (failure to provide *Miranda* warnings to defendant); *State v. Lefthand*, 488 N.W.2d 799 (Minn. 1992) (grounded in Minnesota statutory law; evaluation was limited to competency only, and state went beyond limitations); *State v. Vosler*, 216 Neb. 461, 345 N.W.2d 806 (1984) (grounded in Nebraska law and factually dissimilar). Other cases involved such dissimilar issues as to be simply not on point. *State v. Kleypas*, 272 Kan. 894, 916-923, 40 P.3d 139 (2001) (different issue addressing almost the opposite factual circumstance); *State v. Foster*, 259 Kan.198, 910 P.2d 848 (1996) (ruling based on psychologist-client privilege); *State v. Williams*, 20 Kan.App.2d 185, 884 P.2d 775 (1994) (contempt proceeding regarding efforts by State to compel pre-trial discovery of defendant's psychological evaluation after defendant withdrew insanity defense). And finally, others actually weigh against Defendant, holding that a criminal defendant's psychological evaluation, even a compelled one, can at least be used for impeachment and rebuttal. *Commonwealth v. Sartin*, 561 Pa. 522, 751 A.2d 1140 (2000); *State v. Huskey*, 964 S.W.2d 892 (Tenn. 1998).

In sum, because there was no government misconduct warranting exclusion, the issue boils down to whether the trial court abused its discretion in (a) allowing Defendant's statement to Dr. Welner to be used for impeachment and (b) allowing Dr. Welner to testify on rebuttal. Judicial discretion is abused when a district court's action "is arbitrary, fanciful, or unreasonable." *State v. Kirkpatrick*, 286 Kan. 329, 345, 184 P.3d 247 (2008). Neither the admission of Defendant's prior inconsistent statement to Dr. Welner for impeachment purposes, nor the admission of Dr. Welner's testimony to

rebut that of Dr. Evans was "arbitrary, fanciful, or unreasonable." Rather, both were reasonable and consistent with applicable law.

(B.) The trial court did not abuse its discretion in allowing Defendant's prior inconsistent statements to Dr. Welner to be used for impeachment purposes at trial.

The first alleged misuse of Dr. Welner's interview was during the cross-examination of Defendant. After Defendant denied hearing the sheriff say, "Do you mind if we go upstairs?" (R. XXVI, 120.) the prosecutor used Defendant's previous statement to Dr. Welner that he did, in fact, hear the sheriff say that to impeach him. (R. XXVI, 122-23, 127-28.) The trial court allowed this evidence as a prior inconsistent statement. This was proper. K.S.A. 60-420; *State v. Nott*, 234 Kan. 34, 40, 669 P.2d 660 (1983) ("Generally, it is proper to attack the credibility of a witness by showing a prior inconsistent statement of the witness.")

There is no evidence that this statement was unlawfully coerced from Defendant, and indeed, he did not allege so at trial. Thus, the trial court was presented with no reason that would warrant the exclusion of this statement, and it did not abuse its discretion in allowing it for impeachment purposes.

(C.) The trial court did not abuse its discretion in allowing Dr. Welner to testify in rebuttal

Following the testimony of Defendant's expert, Dr. Evans, who testified that due to the effects of methamphetamine, Defendant could not have formed the premeditated intent to kill, the State called Dr. Welner as a rebuttal witness. He was a proper rebuttal witness because Defendant clearly put his mental state at issue, Dr. Evans relied to some extent on Dr. Welner's report, and, like Dr. Evans, he testified extensively about the effects of methamphetamine on the brain, and he specifically rebutted the conclusions of

Dr. Evans. Contrary to Defendant's assertion, his testimony did not extensively delve into mental disorders, but rather focused on the same things that Defendant's expert focused on: the effects of methamphetamine on Defendant's judgment, decision-making, and overall mental state at the time of the murder.

Admittedly, in the testimony of both experts, the lines between mental defect and voluntary intoxication were sometimes blurred. Perhaps, that is because the line drawn by the law is somewhat arbitrary and not entirely realistic. Nevertheless, it must be recognized that both experts testified about the effects of drugs on the brain, about brain functions, brain illnesses, and ultimately, Defendant's mental capabilities at the time of the murder.

Defendant's expert, Dr. Evans, identified himself as a "psychiatric pharmacy specialist." (R. XXVII, 6.) He explained that his work involved "questions about how drugs affect people." (R. XXVII, 7.) He testified extensively about brain functions, the effects of drugs on the brain, and psychological symptoms of methamphetamine use. (R. XXVII, 14-18.) He discussed paranoid psychosis, drug induced psychosis, and drug induced paranoia. (R. XXVII, 17-18.) He then rendered an opinion that Defendant showed "symptoms of psychosis." (R. XXVII, 21.) He further opined that at the time of the murder, Defendant was under the effects of methamphetamine and that it affected his ability to premeditate the murder. (R. XXVII, 22-26.) Finally, he admitted that he reviewed and used the prior neuropsychological testing of Defendant (conducted by Dr. Price) as part of the basis for his opinion (R. XXVII, 35, 49-51.), and he discussed some of the findings of that testing. (R. XXVII, 49-51.) Further, defense counsel candidly admitted that Dr. Evans also relied in part on the report of Dr. Welner. (R. XXVII, 61.)

In rebuttal, Dr. Welner testified that he was a forensic psychiatrist and was "board certified in . . . clinical psychopharmacology." (R. XXVII, 65.) He explained that psychopharmacology "relates to medications and drugs, and other kinds of physical treatments and their relationship to psychiatric illness." (R. XXVII, 65.) He testified that he had worked on cases involving methamphetamine and had treated patients who used methamphetamine. (R. XXVII, 79.) He testified that in this case, he reviewed the police reports, witness interviews, medical reports, and historical evidence regarding Defendant's past behavior and substance abuse. (R. XXVII, 82.) He further testified that he interviewed Defendant,[3] read materials that he had written, and reviewed Defendant's prior neuropsychological testing, and even reviewed Dr. Evans' report. (R. XXVII, 83-84.)

As did Dr. Evans, Dr. Welner discussed paranoia and its symptoms. (R. XXVII, 88-89.) And also, as did Dr. Evans, he discussed the findings of the neuropsychological testing on Defendant and the report written by Dr. Price. (R. XXVII, 100-102.) Dr. Welner testified that as part of his charge to evaluate the relationship between methamphetamine and Defendant's behavior on January 19, 2005, he looked into a variety of other possible influences such as alcohol, personality conditions, mental disorders, and environmental phenomena. (R. XXVII, 103-05.) He also testified that he discussed with Defendant the effects methamphetamine had on him. (R. XXVII, 106-07.) And finally, as did Dr. Evans, he rendered a professional opinion about the effect methamphetamine had on Defendant's mental processes on the day of the murder. (R. XXVII, 107-113.)

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[3] It should also be recognized that to the extent that Dr. Welner relayed any inculpatory statements of Defendant, Defendant had already testified on direct and admitted his involvement in all of the crimes.

The crux of Dr. Welner's testimony was that based on the available evidence of Defendant's conduct before he used methamphetamine that morning, and his conduct afterward, there was no observable change in his behavior or impairment of his perceptions and decision-making ability. (R. XXVII, 96-97, 107-113.) Therefore, there was no evidence to conclude that the methamphetamine affected Defendant's mental processes or behavior. This directly rebutted Dr. Evans' testimony. This opinion was not grounded on any psychiatric diagnosis or character evidence as Defendant contends, but on empirical, objective evidence of Defendant's behavior as it related to his use of methamphetamine on that day.

Dr. Welner's testimony was no broader in scope than Dr. Evans' testimony. It covered the same topics and relied on much of the same scientific evidence and reporting (indeed, the two doctors reviewed each other's reports and considered them in reaching their respective opinions). While Defendant now claims Dr. Welner's testimony went beyond the scope of rebutting Dr. Evans' testimony, he failed to raise any such objections during Welner's testimony. That is, of course, because there were no grounds for such objections. In truth, Dr. Welner's testimony directly rebutted Dr. Evan's testimony and was proper rebuttal evidence. Therefore, the trial court did not abuse its discretion in allowing it.

REPLY BRIEF

Supreme Court, U.S.
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RECORD
AND

No. 12-609

In the Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

SCOTT D. CHEEVER,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Kansas

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CONSTITUTION

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STATUTE

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I. This Court Has Jurisdiction Over The Kansas Supreme Court's Final Decision On The Fifth Amendment Question.

Under 28 U.S.C. § 1257(a), "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution . . . ." The Kansas Supreme Court in this case clearly addressed and decided the federal issue presented in Question 1 in the State's petition for a writ of certiorari, namely that the admission of the State's expert testimony violated respondent's Fifth Amendment privilege against self-incrimination. Pet. App. 18-19, 22-35.

The Kansas Supreme Court's decision on respondent's Fifth Amendment claim is a final decision on the federal question that – if not reviewed and reversed by this Court – necessarily results in the reversal of respondent's capital murder conviction and sentence. Respondent nonetheless erroneously contends that the judgment is not "final" because the court below chose not to resolve all other claims respondent raised on appeal. Brief in Opposition ("Opp.") 5-9. Respondent argues that finality is lacking because, if this Court grants certiorari and reverses the decision below, additional litigation will follow. But that is often the case, particularly so in criminal cases in which a conviction or sentence has been reversed and further trial court proceedings remain.

The fact that a reversal by this Court on a federal question the lower court conclusively decided may not

finally resolve the entire case does not alter the conclusion that the ruling below on the federal question is "final" under § 1257(a), as numerous decisions of the Court over many years clearly establish. *See, e.g.*, *Kansas v. Marsh*, 548 U.S. 163, 168-169 (2006) (Eighth Amendment question); *New York v. Quarles*, 467 U.S. 649, 651 n.1 (1984) (Fourth Amendment question); *Florida v. Meyers*, 466 U.S. 380, 381 n.a1 (1984) (Fourth Amendment question); *South Dakota v. Neville*, 459 U.S. 553, 558 n.6 (1983) (Fifth Amendment question); *California v. Stewart*, 384 U.S. 436, 499 n.71 (1966) (Fourth Amendment question).

This case is readily distinguishable from *Johnson v. California*, 541 U.S. 428 (2004), the primary case the respondent cites for the argument that there is no "final" decision here for the Court to review. *Johnson* involved an attempt to obtain review of a state supreme court decision that was reversing a state intermediate appellate court decision, a reversal with directions that the intermediate court consider unresolved appellate issues on remand; *Johnson* did not involve a state supreme court reversing a trial court decision and remanding for a new trial. Thus, in *Johnson*, unlike this case, additional *appellate* proceedings in the state courts necessarily were to occur. As a result, even if the defendant lost on all issues in the further appellate proceedings, nothing would have precluded him from reasserting the federal *Batson* claim in a subsequent appeal to the state supreme court and then to this Court, if necessary.

In stark contrast, here there are no additional state appellate proceedings to follow from the Kansas Supreme Court's decision, and no further appellate

opportunity for the State to prevail in this case on non-federal grounds. Rather, the State's only options are an appeal of the Fifth Amendment issue to this Court at this time, or to retry the respondent with an adverse Fifth Amendment ruling that seriously impairs the State's ability to contest the respondent's claim that he was incapable of forming the requisite mental state to commit capital murder. Whether respondent is acquitted or convicted in a retrial, there will be no opportunity for a renewed appeal of the Fifth Amendment question. *Cf. Kansas v. Marsh*, 548 U.S. at 168.

Indeed, this case presents a situation that is legally indistinguishable from *Kansas v. Marsh*, in which the Court readily concluded that the potential for retrial in a criminal case does not call into question the finality of the state supreme court's conclusive decision on a federal question. In *Marsh*, the Court emphasized that, under *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 481 (1975), § 1257 authorizes review of a state court judgment "where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." 548 U.S. at 168. This case, like *Marsh*, fits squarely within that category.

Notably, *Marsh* postdates *Johnson v. California* by two years, and if the Court actually intended *Johnson* to work the radical change in finality jurisprudence that respondent claims, presumably the *Marsh* decision would have had something to say about *Johnson*. Instead, the clear and well-settled rule is that finality exists in the circumstances presented here, as *Marsh*

makes plain. *See also Neville*, 459 U.S. at 558 n.6 (Fifth Amendment question is "final"); *Quarles*, 467 U.S. at 651 n.1 (Fourth Amendment question is "final"); *Meyers*, 466 U.S. at 381 n.a1 (same); *Stewart*, 384 U.S. at 499 n.71 (same). Indeed, even respondent grudgingly admits that "[t]his case arguably falls in that category" under *Cox Broadcasting*. Opp. 8-9.

That Kansas may retry respondent on the charges of capital murder and attempted capital murder does not alter the fact that the Kansas Supreme Court indisputably and conclusively decided the federal question whether the admission of Dr. Welner's testimony (in rebuttal to respondent's claim that he lacked the mental capacity to form the intent to commit the crimes) violated the Fifth Amendment. That issue cannot now be relitigated in the state courts, so its resolution is "final" for purposes of § 1257.

II. The Kansas Supreme Court Decided The Fifth Amendment Question On The Merits, Plainly Giving This Court Jurisdiction To Review That Federal Issue.

A. The Fifth Amendment Question Is Properly Before The Court.

Respondent incorrectly argues that the State waived the Fifth Amendment question by not making specific *arguments* about that question in the state courts. Opp. 9-11. That assertion is baseless for several reasons. First, it was *respondent* who raised the Fifth Amendment claim; the State simply responded to his argument that the Constitution had been violated. In the trial court, respondent was convicted of capital

murder and sentenced to death; it was not the State's obligation or duty to raise issues on appeal from a judgment in the State's favor; indeed it would have been improper for the State to do so. In answering respondent's assertion of trial court error, however, the State argued that "differences between [federal] rules and state rules do not transform Dr. Welner's lawful interview with Defendant into something unlawful." Appendix to Respondent's Brief in Opposition ("Resp. App.") 31. The State also argued that the admission of Dr. Welner's testimony was consistent with this Court's decisions in *Estelle v. Smith*, 451 U.S. 454 (1981), and *Buchanan v. Kentucky*, 483 U.S. 402 (1987). Resp. App. 31-32.

In any event, which party did or did not raise what issue(s) is completely irrelevant at this point. The Court's longstanding practice, applied in numerous cases for a century at least, is that "[a] ruling on the merits of a federal question by the highest state court leaves the federal question open to review." *Franks v. Delaware*, 438 U.S. 154, 161 (1978). At least as far back as 1914, the Court has recognized its authority to review a federal question *actually* decided by state courts, even if that particular federal question "had not been expressly asserted below." *Manhattan Life Ins. Co. v. Cohen*, 234 U.S. 123, 134 (1914); *id.* ("it is irrelevant to inquire how and when a Federal question was raised in a court below when it appears that such question was actually considered and decided."); *see also Raley v. Ohio*, 360 U.S. 423, 436 (1959) ("There can be no question as to the proper presentation of a federal claim when the highest state court passes on it."); *Orr v. Orr*, 440 U.S. 268, 274-75 (1979) (quoting *Manhattan Life, supra*); and *Payton v. New York*, 445

U.S. 573, 582 n. 19 (1980) ("Although it is not clear from the record that appellants raised this constitutional issue in the trial courts, since the highest court of the State passed on it, there is no doubt that it is properly presented for review by this Court."). *See also Ward v. Monroeville*, 409 U.S. 57, 61 (1972); *Ocala Star-Banner v. Damron*, 401 U.S. 295, 299 n.3 (1971); *Whitney v. California*, 274 U.S. 357, 360-62 (1927); *Adams v. Robertson*, 520 U.S. 83, 86 (1997) ("we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was *either* addressed by, *or* properly presented to, the state court that rendered the decision we have been asked to review.") (Emphasis added).

Thus, even if the Fifth Amendment question somehow was not "properly presented" by the parties' briefs in the Kansas state courts, the fact that the Kansas Supreme Court indisputably addressed and decided the issue suffices to confer jurisdiction on this Court to review the question. *See* Pet. App. 35 ("allowing Dr. Welner to testify in rebuttal to the voluntary intoxication defense violated Cheever's constitutional rights under the Fifth and Fourteenth Amendments to the United States Constitution.") There is no question that the jurisdictional requirements of 28 U.S.C. § 1257 are satisfied here.

B. The Kansas Supreme Court's Decision Does Not Rest On Any Independent And Adequate State Ground.

Contrary to respondent's misguided contention that there are independent and adequate state grounds to sustain the Kansas Supreme Court's decision, Opp. 20-24, the truth is that the lower court's decision rests *solely and exclusively* on *federal* constitutional grounds. What respondent actually asserts, effectively, is that there may be *potential* state grounds which – if this Court was to reverse the decision below – on remand could permit the state courts to rule in respondent's favor, at least possibly, maybe, perhaps.

In this regard, respondent tellingly admits that he argued below that the admission of Dr. Welner's testimony also violated state evidentiary rules, but "the court did not reach it [the state law claim]." Resp. Opp. 20-21. To similar (non-)effect, respondent advises that "should this Court reverse the decision of the Kansas Supreme Court, Mr. Cheever will seek further review on this issue." *Id.* at 21-23. Even assuming those assertions to be accurate, they matter not a whit: the fact that state law arguments *could potentially be made if* this Court reverses on the federal constitutional issue and remands the case does not demonstrate in any way that the decision the State is asking this Court to review rests on an independent and adequate state law ground. *Michigan v. Long*, 463 U.S. 1032, 1040-1041 (1983).

Although respondent raised many issues in his appeal to the Kansas Supreme Court, that court relied solely on its Fifth Amendment analysis to reverse

respondent's capital murder convictions and death sentence. There simply is no plausible claim that the Kansas Supreme Court actually decided the appeal on the basis of an independent and adequate state law ground. See *Florida v. Meyers*, 466 U.S. at 381 n.a1.

III. Respondent Concedes That The Kansas Supreme Court's Decision Conflicts With Precedent In The Federal Circuits.

The State already has demonstrated in its petition that the Kansas Supreme Court's decision conflicts with this Court's precedents, with numerous decisions in the federal Circuits, and with decisions by other state courts of last resort. In essence, the majority view (following the rationale of *Buchanan v. Kentucky*, 483 U.S. 402 (1987)), is that when a criminal defendant puts his mental state at issue, either through the admission of expert or other testimony, the Fifth Amendment does not bar the State from rebutting that testimony with expert testimony, including reports from court-ordered mental examinations. In this case, however, the Kansas Supreme Court ruled exactly the opposite and took the minority view, deepening a split of authority on the question. Respondent's efforts to characterize the Kansas Supreme Court's decision as consistent with the vast bulk of federal precedent fails utterly, Opp. 11-20, as demonstrated in the State's petition for a writ of certiorari. Moreover, respondent does not even mention or discuss the contrary state supreme court decisions. *Cf.* Pet. 18-21 (discussing several contrary state court decisions).

Instead, respondent repeatedly argues the specifics of Kansas law and his understanding of how Kansas

law purportedly differs from federal law. Opp. 13-17 (referring to "Kansas law" at least eight times). Thus, respondent embraces the same erroneous rationale that the Kansas Supreme Court adopted here, *i.e.*, that the Fifth Amendment question turns on the particular characteristics of Kansas's or any other particular State's law. That rationale is fundamentally flawed because the Court long has made clear that the scope of the Fifth Amendment privilege against self-incrimination is a federal question, not a question of state law. *Brookhart v. Janis*, 384 U.S. 1, 4 (1966).

Like the Kansas Supreme Court, respondent misguidedly attempts to rely on the non-existent distinction between federal and state statutes in this context when he argues that the Kansas Supreme Court decision is distinguishable from contrary federal Circuit precedent such as *United States v. Curtis*, 328 F.3d 141 (4th Cir. 2003), and *United States v. Halbert*, 712 F.2d 388 (9th Cir. 1983), because he says those decisions involved federal criminal statutes rather than state statutes. The Fifth Amendment privilege, however, does not differ depending on whether a criminal case is brought under federal or state statutes; the privilege is not forum dependent.

Notably, respondent does not even try to reconcile *Schneider v. Lynaugh*, 835 F.2d 570, 575 (5th Cir. 1988), with the Kansas Supreme Court's decision. Instead, he simply asserts that *Schneider* was decided incorrectly. Whether or not that is true, it certainly proves the point that even respondent recognizes that there is a genuine split of authority on the first question presented in the State's petition. In fact, the split of authority is considerably more extensive than

between just *Schneider* and the Kansas Supreme Court's decision here, because again respondent totally ignores *all other state supreme court decisions* on this question, decisions identified and discussed in the State's petition at pages 18-24.

Ultimately, there is no denying that there is a split of authority on an important and recurring constitutional question, a situation that warrants this Court's review.

IV. The Kansas Supreme Court Rejected On Federal Constitutional Grounds The State's Primary Rationale For Permitting The Use of Dr. Welner's Testimony To Impeach Respondent's Own Testimony Regarding His Mental State, An Issue Inextricably Intertwined With The First Question Presented.

As explained in the State's petition for a writ of certiorari, the Kansas Supreme Court rejected the primary rationale in support of the State's argument that the prosecution could use statements respondent made to Dr. Welner in order to impeach respondent's own testimony about respondent's mental state at the time he shot Sheriff Samuels. The State argued that, by analogy to cases such as *Harris v. New York*, 401 U.S. 222 (1971), and *Kansas v. Ventris*, 556 U.S. 586 (2009), even if the State could not use respondent's statements in the prosecution's case-in-chief, the State should be able to use those statements to impeach respondent once he chose to testify. Pet. App. 36. The Kansas Supreme Court plainly rejected that rationale for admitting the evidence as impeachment, although

that court at the same time purported not to resolve conclusively whether such evidence ever could be used for impeachment.

That part of the opinion plainly rejects the States' primary – if not sole – rationale for the admission of such evidence, leaving no further realistic avenue for the State to raise the issue again in this case, including in a retrial where a trial court necessarily will and must conclude that the impeachment evidence is inadmissible. At bottom, the impeachment use of Dr. Welner's testimony presents a Fifth Amendment question closely related to and inextricably bound up with the first Question Presented in the State's petition. In these circumstances, the Court certainly may – and with all due respect in the view of Kansas the Court should – grant review of *both* of these closely-related Fifth Amendment questions in order to resolve the splits of authority that exist on both issues.

Respectfully submitted,

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JOINT APPENDIX

RECORD
AND
BRIEFS

No. 12-609

Supreme Court, U.S.
FILED
MAY 13 2013
OFFICE OF THE CLERK

In the Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

SCOTT D. CHEEVER,

Respondent.

On Writ of Certiorari to the Supreme Court of Kansas

JOINT APPENDIX

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Counsel for Petitioner

May 13, 2013

Petition for a Writ of Certiorari filed November 13, 2012
Petition for Writ of Certiorari granted February 25, 2013

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Law Library

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The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for a Writ of Certiorari:

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RELEVANT DOCKET ENTRIES

Greenwood County District Court, Kansas

Case No. 2006-CR-000198

State of Kansas vs. Scott D. Cheever

Felony

Date		Judge
10/25/2006	Complaint	Mike Ward
	Affidavit	Mike Ward
	Arrest Warrant Issued Bond amount: .00 Defendant: Cheever, Scott D	Mike Ward
11/3/2006	Arrest Warrant Served/ Returned Defendant: Cheever, Scott D	Mike Ward
11/6/2006	Defendant: Cheever, Scott D Attorney of Record Kevin A Graham Entry of Appearance	Mike Ward
11/30/2006	Officer: Unknown Officer, GWSOSubpoena issued	Mike Ward
	Officer: Harm, Tom, GWSOSubpoena issued	Mike Ward
	Officer: Holsinger, Tim KBI, GWSOSubpoena issued	Mike Ward

Date		Judge
	Officer: Stoppel, Kelly KHP, GWSOSubpoena issued	Mike Ward
	Officer: Keener, Robert KHP, GWSOSubpoena issued	Mike Ward
12/4/2006	Officer: Harm, Tom, GWSO Subpoena Served/Returned	Mike Ward
12/7/2006	Officer: Keener, Robert KHP, GWSOSubpoena Served/ Returned	Mike Ward
	Officer: Stoppel, Kelly KHP, GWSOSubpoena Served/ Returned	Mike Ward
	Officer: Unknown Officer, GWSOSubpoena Served/ Returned	Mike Ward
12/8/2006	Officer: Klamm, David, KBI Subpoena Served/Returned	Mike Ward
	Officer: Holsinger, Tim KBI, GWSOSubpoena Served/ Returned	Mike Ward
12/15/2006	Motion for Continuance	Mike Ward
12/18/2006	Officer: Keener, Robert KHP, GWSOSubpoena Served/ Returned	Mike Ward
	Officer: Stoppel, Kelly KHP, GWSOSubpoena Served/ Returned	Mike Ward

Date		Judge
12/20/2006	Order to Transport Matthew Denny	Mike Ward
	Officer: Unknown Officer, GWSOSubpoena issued	Mike Ward
	Officer: Harm, Tom, GWSO Subpoena issued	Mike Ward
	Officer: Keener, Robert KHP, GWSOSubpoena issued	Mike Ward
	Officer: Stoppel, Kelly KHP, GWSOSubpoena issued	Mike Ward
	Officer: Holsinger, Tim KBI, GWSOSubpoena issued	Mike Ward
	Officer: Klamm, David, KBI Subpoena issued	Mike Ward
	Witness: Denny, Matthew Subpoena issued	Mike Ward
12/21/2006	Order of Continuance	Mike Ward
12/26/2006	Officer: Unknown Officer, GWSOSubpoena Served/ Returned	Mike Ward
	Officer: Harm, Tom, GWSO Subpoena Served/Returned	Mike Ward
12/29/2006	Order Transporting Defendant to Sedgwick County Jail	Mike Ward

Date		Judge
1/3/2007	Officer: Keener, Robert KHP, GWSOSubpoena Served/ Returned	Mike Ward
	Officer: Stoppel, Kelly KHP, GWSOSubpoena Served/ Returned	Mike Ward
1/4/2007	Witness: Denny, MatthewSubpoena Served/ Returned	Mike Ward
1/5/2007	Officer: Klamm, David, KBI Subpoena Served/Returned	Mike Ward
	Officer: Holsinger, Tim KBI, GWSOSubpoena Served/ Returned	Mike Ward
1/23/2007	Order to Transport	Mike Ward
1/26/2007	Amended Complaint	Mike Ward
2/1/2007	Witness Voucher	Mike Ward
2/23/2007	Notice of Intent to Request Separate Sentencing and Notice of Aggravating Circumstances	Mike Ward
	Defendant's Waiver of His Rights to Speedy Trial	Mike Ward
4/9/2007	Certificate of Completion of Transcript Transcript of Preliminary Hearing	Mike Ward
4/23/2007	Defendant: Cheever, Scott D Attorney of Record Timothy A Frieden	Mike Ward

Date		Judge
	Motion for Notice of And Pretrial Hearing Regarding Admissibilty of all Hearsay Statements	Mike Ward
	Motion for Jury Questionnaire	Mike Ward
	Motion to Bar Victim Impact Evidence	Mike Ward
	Motion to Prohibit Extrajudicial Statements by Trial Participants	Mike Ward
	Motion for Accused to Appear in Civilian Clothing	Mike Ward
	Motion for Accused to Appear at all Proceedings without Restraints	Mike Ward
	Motion to Bar the Death Penalty	Mike Ward
	Motion for a Pretrial Hearing Regarding Gruesome Photographs	Mike Ward
	Motion to Determine Duration of Accused's Sentence before Jury Deliberations in Penalty Phase	Mike Ward
	Memorandum of Law RE: Capital Voir Dire	Mike Ward

Date		Judge
	Motion to Bar "For Cause" Challenges of Jurors Based on Their Religious Opposition to the Death Penalty	Mike Ward
	Motion to Determine Order of Closing Argument at Penalty Phase	Mike Ward
	Motion to Reveal any deal made by the state	Mike Ward
	Motion for Compensation of Jurors at Current Wages and for Reimbursement to Primary Caregivers for Day Care Cost	Mike Ward
5/7/2007	State's Response to Defendant's Motion for Notice of and Pretrial Hearing Regarding Admissibility of all Hearsay Statements	Mike Ward
	State's Response to Defendant's Motion to Prohibit Extrajudicial Statements by Trial Participants	Mike Ward
	State's Response to Defendant's Motion to Bar Victim Impact Evidence	Mike Ward

Date		Judge
	State's Response to Defendant's Motion for Jury Questionnaire	Mike Ward
	State's Response to Defendant's Motion for Defendant to Appear in Civilian Clothing	Mike Ward
	State's Response to Defendant's Motion for Defendant to Appear at all Proceedings Without Restraints	Mike Ward
	State's Response to Defendant's Motion to Bar the Death Penalty	Mike Ward
	State's Response to Defendant's Motion for a Pretrial Hearing Regarding Gruesome Photographs	Mike Ward
	State's Response to Defendant's Motion to Determine Duration of Accused's Sentence Before Jury Deliberations in Penalty Phase	Mike Ward
	State's Response to Defendant's Motion to Bar "For Cause" Challenges of Jurors, Based on Their Religious Opposition to the Death Penalty	Mike Ward

Date		Judge
5/7/2007	State's Response to Defendant's Motion to Determine Order of Closing Argument at Penalty Phase	Mike Ward
	State's Response to Defendant's Motion to Reveal any Deal Made by the State	Mike Ward
	State's Response to Defendant's Motion for Compensation of Jurors at Current Wages and for Reimbursement to Primary Caregivers for Day Care Cost	Mike Ward
5/10/2007	Notice of Intent to Offer Evidence of Other Crimes	Mike Ward
	State's Discovery Request	Mike Ward
6/14/2007	Motion to Determine the Admissibility of Defendant's Statements/Ctf of Svc **Confidential Pleading** (Motion)	Mike Ward
7/2/2007	Order	Mike Ward
7/23/2007	**Confidential Pleading** (Ex Parte Order) Document sealed	Mike Ward

Date		Judge
8/6/2007	**Confidential Pleading" (Ex Parte Order) Document sealed	Mike Ward
8/8/2007	Motion to Replace Toxic Terms Commonly Used in the Trial of a Capital Case	Mike Ward
	Motion to Preclude Improper Impeachment of Expert Witnesses	Mike Ward
	Motion to Prohibit Antemortem Photographs	Mike Ward
	Motion for Discovery of Mitigating Evidence	Mike Ward
	Motion for Discovery of Impeachable Prior Convictions	Mike Ward
	Motion for Order of Exclusion and Separation of Witnesses	Mike Ward
	Motion to Prohibit State from Seeking the Death Penalty Due to Evolving Standards of Decency	Mike Ward
	Motion to Find the Kansas Death Penalty Unconstitutional	Mike Ward
	Motion for Specific Discovery	Mike Ward

Date		Judge
8/17/2007	State's Response to Defendant's Motion to Replace Toxic Terms Commonly Used in the Trial of a Capital Case	Mike Ward
	State's Response to Defendant's Motion to Preclude Improper Impeachment of Expert Witnesses	Mike Ward
	State's Response to Defendant's Motion	Mike Ward
	State's Response to Defendant's Motion for Discovery of Mitigating Evidence	Mike Ward
	State's Response to Defendant's Motion for Sequestration	Mike Ward
	State's Proposed Jury Questionaire	Mike Ward
	State's Proposal Concerning Completion of the Jury Questionnaire and Jury Selection	Mike Ward
	State's Response to Defendant's Motion for Discovery of Impeachable Prior Convictions	Mike Ward

Date		Judge
	State's Response To Defendant's Motion for Specific Discovery	Mike Ward
8/27/2007	**Confidential Pleading** (Ex Parte Order) Document sealed	Mike Ward
9/10/2007	Witness: Cardenas, Domingo JrSubpoena Served/ Returned	Mike Ward
	Witness: Keener, RobertSubpoena Served/ Returned	Mike Ward
	Witness: Stoppel, TravisSubpoena Served/ Returned	Mike Ward
	Witness: Mitchell, ErikSubpoena Served/ Returned	Mike Ward
	Witness: Cole, DianaSubpoena Served/ Returned	Mike Ward
	Witness: Romans, Pat Subpoena Served/ Returned	Mike Ward
	Witness: Piatt, Dean Subpoena Served/ Returned	Mike Ward
	Witness: Halvorsen, Bill Subpoena Served/ Returned	Mike Ward

Date		Judge
	Witness: Coffman, Bruce Subpoena Served/ Returned	Mike Ward
	Witness: Crow, Brad Subpoena Served/ Returned	Mike Ward
	Witness: Ewy, Randy Subpoena Served/ Returned	Mike Ward
	Witness: Hagen, Ron Subpoena Served/Returned	Mike Ward
	Witness: Horn, John Subpoena Served/ Returned	Mike Ward
	Witness: Jacobs, Robert Subpoena Served/ Returned	Mike Ward
	Witness: Klamm, David Subpoena Served/ Returned	Mike Ward
	Witness: Page, Rod Subpoena Served/Returned	Mike Ward
	Witness: Wright, David Subpoena Served/ Returned	Mike Ward
	Witness: Holsinger, TimSubpoena Returned, No Service	Mike Ward

Date		Judge
	Witness: Tierney, Neal Subpoena Served/ Returned	Mike Ward
	Praecipe for Subpoena	Mike Ward
	Witness: Mullins, Michael Subpoena Served/ Returned	Mike Ward
	Order to Transport	Mike Ward
	Application for Writ of Habeas Corpus ad Testificandum	Mike Ward
	Writ of Habeas Corpus Ad Testificandum	Mike Ward
9/14/2007	Designation of Expert Witness's of Scott Cheever	Mike Ward
	Scott Cheever's Proposed Jury Questionnaire	Mike Ward
9/17/2007	Motion to Find the Kansas Death Penalty Unconstitutional	Mike Ward
	Motion for Discovery	Mike Ward
	Motion to Declare the Kansas Death Penalty Unconstitutional (KSA 21.4624.c)	Mike Ward
	Motion to Declare the Kansas Death Penalty Unconstitutional (KSA 21.4264)	Mike Ward

Date		Judge
	Accused's Motion in Limine to Prevent Improper Comment by the State	Mike Ward
9/19/2007	Motion to Dismiss Due to Prosecutional Abuse of Process	Mike Ward
	Motion for Allocution Before the Sentencing Jury	Mike Ward
	Joint Order to Produce Records	Mike Ward
	Journal Entry	Mike Ward
9/20/2007	State's Response to Defendant's Motion for Specific Discovery	Mike Ward
9/21/2007	Praecipe for Subpoena	Mike Ward
	Praecipe for Subpoena	Mike Ward
9/21/2007	Response to Defendant's Motion to Dismiss Due to Prosecutorial Abuse of Process	Mike Ward
	State's Request for Discovery and Inspection	Mike Ward
9/24/2007	State's Response to Defendant's Motion for Allocution before the Sentencing Jury	Mike Ward
	**Confidential Pleading" (Motion) Document sealed	Mike Ward

Date		Judge
	Confidential Pleading (Affidavit) Document sealed	Mike Ward
	Officer: Carson, Jim, KHP Subpoena Served/ Returned	Mike Ward
	Witness: Thompson, Derric Subpoena Served/ Returned	Mike Ward
	Witness: Wright, Shae Subpoena Served/ Returned	Mike Ward
	Witness: Cooper, Belinda Kaye Subpoena Served/ Returned	Mike Ward
	Witness: Mackey, Christai Subpoena Served/ Returned	Mike Ward
	Witness: O'Brien, Rhonda Subpoena Served/ Returned	Mike Ward
	Witness: Anstey, Brian Subpoena Served/ Returned	Mike Ward
	Witness: O'Brien, Tiffany Subpoena Served/ Returned	Mike Ward
	Witness: Knight, Nancy J Subpoena Served/Returned	Mike Ward

Date		Judge
	Witness: McKenzie, Nancy Subpoena Served/ Returned	Mike Ward
	Witness: Hinrichs, Andrea J Subpoena Served/Returned	Mike Ward
9/25/2007	"Confidential Pleading" (Memo) Document sealed	Mike Ward
	"Confidential Pleading" (Response) Document sealed	Mike Ward
9/26/2007	Witness: Maxfield, Mitchell Subpoena Served/ Returned	Mike Ward
	"Confidential Pleading" (Affidavit) Document sealed	Mike Ward
9/27/2007	Waiver of Appearance	Mike Ward
10/9/2007	Witness: West, Sharon Subpoena Served/ Returned	Mike Ward
	Witness: Shaw, Sharon Subpoena Served/ Returned	Mike Ward
	Witness: McClain, Fred Subpoena Served/ Returned	Mike Ward
	Witness: Pitco, Bill Subpoena Served/Returned	Mike Ward

Date		Judge
	Witness: Sanders, RobertSubpoena Served/ Returned	Mike Ward
	Order	Mike Ward
	Certificate	Mike Ward
10/10/2007	Witness: McIlvain, Ross Subpoena Served/ Returned	Mike Ward
	Witness: Freisner, Donald Subpoena Served/ Returned	Mike Ward
	Witness: McClary, Carl Subpoena Served/ Returned	Mike Ward
	Motion for Material Witness Certificate	Mike Ward
10/11/2007	Witness: Freisner, Brenda Sue Subpoena Served/ Returned	Mike Ward
	Witness: Fife, Nathan Jay Subpoena Served/ Returned	Mike Ward
10/11/2007	Order	Mike Ward
10/12/2007	Witness: Jordan, Jeremy Subpoena Served/ Returned	Mike Ward
	Witness: Harm, Thomas Subpoena Served/ Returned	Mike Ward

Date		Judge
	Witness: Dial, Crystel Subpoena Served/ Returned	Mike Ward
	Order to Transport/Witness	Mike Ward
10/15/2007	Juror Questionnaires Document sealed	Mike Ward
10/16/2007	Witness: Leedy, Kenneth Subpoena Served/ Returned	Mike Ward
10/19/2007	Peremptory Challenge Chart Document sealed	Mike Ward
	List of Jurors Document sealed	Mike Ward
	Subpoena: Subpoena Served/Returned on 10/19/2007 on Witness: Bledsoe, Jeffrey	Mike Ward
	Subpoena: Subpoena Served/Returned on 10/19/2007 on Witness: Atchinson, Joseph	Mike Ward
10/22/2007	Witness Voucher for 10-19-07	Mike Ward
10/24/2007	Stipulation	Mike Ward
10/29/2007	Transcript Filed. (Court Reporter Has Transcript)	Mike Ward
10/30/2007	Verdict Form	Mike Ward

Date		Judge
	Jury Trial-Guilty Verdict (21.3439.a.5: Intentional & premeditated killing of a law enforcement officer)	Mike Ward
	Case Status Change: Disposed	Mike Ward
	Jury Trial-Guilty Verdict (21.3439.a.5: Intentional & premeditated killing of a law enforcement officer)	Mike Ward
	Jury Trial-Guilty Verdict (21.3439.a.5: Intentional & premeditated killing of a law enforcement officer)	Mike Ward
	Jury Trial-Guilty Verdict (21.3439.a.5: Intentional & premeditated killing of a law enforcement officer)	Mike Ward
	Jury Trial-Guilty Verdict (21.3439.a.5: Intentional & premeditated killing of a law enforcement officer)	Mike Ward
	Jury Trial-Guilty Verdict (65.4159: Manufacturing controlled substance)	Mike Ward
	Jury Trial-Guilty Verdict (65.4159: Manufacturing controlled substance)	Mike Ward
	Jury Trial-Guilty Verdict (21.4204.a.3: Criminal possession firearm	Mike Ward

Date		Judge
	w/felony conviction w/in 5 years)	
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11/1/2007	Capital Murder Sentencing Phase Jury Instructions	Mike Ward
	Sentencing Phase Verdict Form	Mike Ward
11/8/2007	Motion for Judgment of Acquittal	Mike Ward
	Motion for Arrest of Judgment	Mike Ward
	Certificate of Completion of Transcripts	Mike Ward
	Transcript Filed - Sentencing Phase Opening Statements by Mr. Evans	Mike Ward
11/8/2007	Transcript Filed - Sentencing Phase Closing Statements by Mr. Evans	Mike Ward
1/14/2008	Presentence Investigation	Mike Ward
1/23/2008	Notice of Appeal	Mike Ward
	Order Appointing Appellate Counsel	Mike Ward
	Order for Transcript	Mike Ward
	Defendant: Cheever, Scott D Attorney of Record Reid Nelson	Mike Ward
	Death Order	Mike Ward

Date		Judge
	Kansas Sentencing Guidelines Journal Entry	Mike Ward
2/11/2008	Amended Order for Transcript	Mike Ward
2/12/2008	Appellant's Request for Additions to the Appellate Record	Mike Ward
2/14/2008	Docketing Notice of Appellate Court	Mike Ward
3/5/2008	Table of Contents	Mike Ward

Kansas Supreme Court

Appellate Case No. 99988

State of Kansas v. Scott D. Cheever

Case Event Detail

Date	Description
16-OCT-12	MEMO NOTATION / RECEIVED RECALLED MANDATE FROM GREENWOOD COUNTY
12-OCT-12	MEMO NOTATION / REQUESTED MANDATE TO BE RECALLED FROM GREENWOOD COUNTY
11-OCT-12	ORDER CONTINUED / Moot-State's 2nd motion to recall mandate & stay proceedings
11-OCT-12	ORDER CONTINUED / expired or if petition for writ is filed & denied or if granted until conclusion
11-OCT-12	ORDER - GRANTING MOTION / to recall mandate & stay proceedings until time for filing writ of certiorari is
11-OCT-12	MEMO MOTION / 2nd Motion To Recall Mandate & Stay Proceedings - STATE
17-SEP-12	MEMO MOTION / To Recall Mandate - STATE OF KANSAS
17-SEP-12	RECORD RETURNED TO CLERK, DISTRICT COURT / 33 VOLUMES (2 BOXES), GREENWOOD COUNTY

17-SEP-12	MANDATE ISSUED / CLERK, GREENWOOD COUNTY
24-AUG-12	PUBLISHED OPINION / 53 pages - $13.25
24-AUG-12	JUDGMENT DOCKETED- OPINION FILED / Affirmed in part, reversed in part, & remanded with directions - Per Curiam
08-MAR-11	CAUSE SCHEDULED FOR HEARING / WEDNESDAY MAY 18, 2011 9:00 AM
22-FEB-11	RECORD RECEIVED - CLERK, DISTRICT COURT / 33 VOLUMES (2 BOXES), GREENWOOD COUNTY
10-FEB-11	RECORD ORDERED FROM CLERK, DIST. CT. / GREENWOOD COUNTY
20-JAN-11	REPLY BRIEF / SCOTT D. CHEEVER
19-JAN-11	MOT. FOR EXT. TO FILE REPLY BR.- GRANTED / DUE 1/20/2011 BR- SCOTT CHEEVER
18-JAN-11	MEMO NOTATION / RPLY BRF HOLD (OOT) - SCOTT D. CHEEVER
16-DEC-10	MOT. FOR EXT. TO FILE REPLY BRIEF / 1ST MOTION (REPLY) - SCOTT D. CHEEVER
01-NOV-10	BRIEF RECEIVED / & APPENDIX - STATE
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04-OCT-10	MOT. FOR EXT. OF TIME TO FILE BRIEF / 3RD MOTION - STATE
08-SEP-10	MEMO NOTATION / NOTICE OF FILING OF CORRECTED BRIEF - CHEEVER
07-SEP-10	AMENDED BRIEF / & APPX - SCOTT D. CHEEVER
20-AUG-10	MEMO ORDER- GRANTING MOTION / TO CORRECT APPELLANT BRIEF. CORRECTED BRIEF DUE 9/30/2010 - SCOTT CHEEVER
04-AUG-10	MEMO MOTION / TO CORRECT APLNT BRIEF - SCOTT D. CHEEVER
19-JUL-10	ORD. GRANTING EXT. OF TIME. TO FILE BRF. / DUE 10/11/2010 BR-STATE OF KANSAS
06-JUL-10	MOT. FOR EXT. OF TIME TO FILE BRIEF / 2ND MOTION - STATE OF KANSAS
21-APR-10	ORD. GRANTING EXT. OF TIME. TO FILE BRF. / DUE 7/13/2010 BR-STATE OF KANSAS
05-APR-10	MOT. FOR EXT. OF TIME TO FILE BRIEF / 1ST MOTION - STATE OF KANSAS
11-JAN-10	BRIEF RECEIVED / CHEAVER - APLE BRF DUE 4/14/2010
07-JAN-10	MEMO ORDER- GRANTING MOTION / TO FILE BRF IN EXCESS OF 100 PGS-CHEEVER. (215 PGS) RESPONSE NOTED.

31-DEC-09	ORD. GRANTING EXT. OF TIME. TO FILE BRF. / DUE 1/11/2010 BR-SCOTT CHEEVER
28-DEC-09	MOT. FOR EXT. OF TIME TO FILE BRIEF / 7TH MOTION - SCOTT D. CHEEVER
17-DEC-09	RESPONSE- / TO MTN TO FILE BRF IN EXCESS OF 100 PAGES - STATE
14-DEC-09	MEMO MOTION / FILE BRF IN EXCESS OF 100 PAGES - SCOTT D. CHEEVER
21-OCT-09	ORD. GRANTING EXT. OF TIME. TO FILE BRF. / DUE 12/28/2009 BR-SCOTT CHEEVER
28-SEP-09	MOT. FOR EXT. OF TIME TO FILE BRIEF / 6TH MOTION - SCOTT D. CHEEVER
10-JUL-09	ORD. GRANTING EXT. OF TIME. TO FILE BRF. / DUE 9/28/2009 BR-SCOTT CHEEVER
29-JUN-09	MOT. FOR EXT. OF TIME TO FILE BRIEF / 5TH MOTION - SCOTT D. CHEEVER
15-APR-09	ORD. GRANTING EXT. OF TIME. TO FILE BRF. / DUE 6/29/2009 BR-SCOTT CHEEVER
30-MAR-09	MOT. FOR EXT. OF TIME TO FILE BRIEF / 4TH MOTION - SCOTT D. CHEEVER
20-JAN-09	ORD. GRANTING EXT. OF TIME. TO FILE BRF. / DUE 3/30/09 BR - SCOTT CHEEVER

13-JAN-09	MEMO ORDER / NOTED. ENTRY OF APPEARANCE BY AILSLIEGER
13-JAN-09	ENTRY OF APPEARANCE / AILSLIEGER FOR STATE
30-DEC-08	MOT. FOR EXT. OF TIME TO FILE BRIEF / 3RD MOTION - SCOTT D. CHEEVER
15-OCT-08	ORD. GRANTING EXT. OF TIME. TO FILE BRF. / AMENDED ORDER-DUE 12/30/2008 BR-SCOTT CHEEVER
09-OCT-08	ORD. GRANTING EXT. OF TIME. TO FILE BRF. / DUE 12/30/08 BR-SCOTT CHEEVER "FINAL EXT"
01-OCT-08	MOT. FOR EXT. OF TIME TO FILE BRIEF / 2ND MOTION - SCOTT D. CHEEVER
15-JUL-08	ORD. GRANTING EXT. OF TIME. TO FILE BRF. / DUE 10/1/08 BR - SCOTT CHEEVER
03-JUL-08	MOT. FOR EXT. OF TIME TO FILE BRIEF / 1ST MOTION - SCOTT D. CHEEVER
03-APR-08	MEMO NOTATION / DUE 07/03/08 - BRF OF APLNT
03-APR-08	CERT. OF COMPLETION OF TRANSCRIPT / FILED 04/01/08 - WILKINSON, CSR
20-FEB-08	MEMO ORDER / NOTED-ENTRY OF APPEARANCE BY JARED MAAG
19-FEB-08	ENTRY OF APPEARANCE / MAAG FOR STATE OF KANSAS

08-FEB-08	ORDER FOR TRANSCRIPT / (AMENDED) DUE 5/8/08 JOHANNA WILKINSON (2/8/08)
08-FEB-08	ORDER APPOINTING COUNSEL
08-FEB-08	DISTRICT COURT DOCUMENTS / (4)
08-FEB-08	NOTICE OF APPEAL FILED / SCOTT D. CHEEVER
08-FEB-08	DOCKETING STATEMENT / SCOTT D. CHEEVER

IN THE THIRTEENTH JUDICIAL DISTRICT
DISTRICT COURT OF GREENWOOD COUNTY, KANSAS
FOURTH DIVISION

[caption omitted in printing]

TRANSCRIPT OF JURY TRIAL
VOLUME V

PROCEEDINGS had before the Honorable Mike Ward, Judge of Division IV of the District Court of Greenwood County , Kansas , and a jury of fifteen, at Eureka, Kansas, on the 29th day of October, 2007, commencing at 9:09 a.m.

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(Thereupon, the following proceedings continued in the hearing of the jury, with the defendant present.)

THE BAILIFF: Please rise. The District Court of Greenwood County, Kansas is now in session with the Honorable Mike Ward presiding.

THE COURT: Please be seated, ladies and gentlemen. Thank you. Sorry to keep you standing there. I had to heat my coffee up a little hotter.

Good morning, counsel.

MR. EVANS: Good morning, Your Honor.

MR. DISNEY: Good morning.

THE COURT: The record will reflect the presence of the jury, counsel, and the defendant. And Mr. Evans are you ready to call your next witness?

MR. EVANS: Yes, sir, we are.

THE COURT: Okay.

(Brief pause.)

R. LEE EVANS, PHARM.D.,

having been first duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

THE COURT: It's a little tight in the

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witness box there, so you kind of have to angle yourself in.

THE WITNESS: Thank you.

DIRECT EXAMINATION

BY MR. EVANS:

Q. Sir, state your name for the record.

A. My name is Roswell Lee Evans, Jr.

Q. You're an Evans. I'm an Evans. We're not related, are we?

A. No.

Q. Before this case we've never met, right?

A. Correct.

Q. Dr. Evans, how are you employed?

A. I am employed by the Auburn University in Auburn, Alabama. I am the Dean of the School of Pharmacy and professor of that institution.

Q. How long have you been Dean of the School of Pharmacy at Auburn?

A. Thirteen years, going on 46.

Q. How old are you?

A. I am 59 years old.

Q. When someone says "pharmacist," we think of going across the street --

A. Right.

Q. -- to a drug store and picking up a prescription

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that the doctor has given us. Is that what you do?

A. No.

Q. What do you do?

A. Actually, I am a psychiatric pharmacy -- psychiatric pharmacy specialist. I am responsible for evaluating

patients and dealing with drug therapy issues that they might have, especially psychiatric patients.

Q. And what training have you had in that particular field?

A. Well, I'm an early dog in that field. Mostly through my doctor of pharmacy training and my residency training I worked with folks in this area, and when I joined the University of Tennessee after my -- after I finished my doctor of pharmacy, I began to work with the Department of Psychiatry in Memphis, where I stayed for four years, and then when I left and went to Kansas City, I continued that work and was affiliated with the School of Pharmacy and the Department of Psychiatry at the University of Missouri-Kansas City, and at that point began a residency, postdoctoral residency and fellowship training program. Did some clinical research and trained both pharmacy students and medical students and psychiatric residents, anybody

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else who was in the environment, about the appropriate use of drugs, and was pretty much devoted to working with the psychiatric team to improve drug therapy and outcomes of those patients that we were taking care of.

Q. Your life's work then has been involved with questions about how drugs affect people?

A. Yes. And that's what folks rely on me for, both in the research environment, also in the practice environment. And also in the classroom.

Q. Not just prescribe drugs, drugs from a doctor, but also illegal drugs; is that right?

A. Yes. You couldn't avoid the illegal part, because most of our patients, or at least a very large percentage of 'em, had comorbid drug abuse problems.

Q. Comorbid?

A. At the same time. They may have been schizophrenic, but they also had a substance problem of some sort as well. Back in the early '70s and mid '70s, the drugs like methamphetamine and cocaine and other things were being introduced, and so we had a lot of problems with methamphetamine, even back then. Sort of went away for a while, and sort of showed up with a vengeance later on.

Q. Have you published extensively in this field?

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A No, I haven't, really. I've presented a lot at symposiums and what have you, but I've not published a great deal in the substance abuse area. Most of my work has been in the -- in terms of publications -- have been in the -- around the development of the practice and also of research that's been done in looking at ethical drug use, in terms of effectiveness.

Q. Have you testified before as an expert?

A. Yes. Yes, I have, probably 20 times over 22 years.

Q. Again, not extensively?

A. No, not extensively.

Q. You testified before as an expert about methamphetamine use?

A. Yes. Most recently I think the -- there was a case in Alabama and there was a case in Missouri where I testified, and specifically about meth. Those are the ones I remember. There may have been others. I just don't remember which ones did what now.

Q. Dr. Evans, we asked you to look into this case approximately six months ago; is that correct?

A. That's correct.

Q. You flew to Wichita, you examined and talked to Scott for a few hours; is that right?

A. Yes.

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Q. What is methamphetamine?

A. Methamphetamine is a stimulant drug. Most people are more familiar perhaps with amphetamines, and amphetamines are used legitimately in medical practice, in treatment of adult -- or attention deficit

disorder. And they have very few other legitimate uses anymore. They used to even be used as diet pills years ago.

Q. Ritalin, that stuff they give your -- prescribe to your children, that's basically an amphetamine?

A. Basically an amphetamine.

Q. Now, what's the difference between an amphetamine and a methamphetamine?

A. It's a chemical derivative, so there's some modifications to the structure of amphetamine. Has a lot of the same effects. Perhaps methamphetamine is a little bit more intense a drug, in terms of its pharmacological impact. And it, too, used to be used as a drug, and it was taken off of the market largely because of its abuse potential, but it's a very intense stimulant that people use.

You know, it's one of those drugs that it's scarier than some of the others we're seeing in the marketplace, in the common marketplace now, in that the impact of the drug is so intense that once you

[p.10]

use it, it's very difficult not to want to use it again.

Q. Now, the jury has heard testimony from Mr. Cheever himself about how the drug is made, also from some other people, I think. Anhydrous ammonia?

A. Yeah.

Q. Some things that by themselves would be poisonous.

A. Right.

Q. And yet the -- these chemicals are combined and injected into the body. How is that not toxic?

A. Well, the production -- when you start talking about the production process, there are a couple of different ways to make methamphetamine. The most common one and the one that Mr. Cheever was involved with was using anhydrous ammonia to reduce drugs like pseudoephedrine, which is a common cold I preparation that we've been using forever, which is now not available over the counter because of the methamphetamine problem. But reducing -- causing a chemical reaction will produce methamphetamine. It's a pretty simple piece of chemistry. And then it creates a relatively rough substance that's got methamphetamine in it.

And it's nor without its toxicity. It's not exactly a pure compound by itself once you get

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it, and it's pretty consistent in terms of the quality and concentration and that kind of stuff, so it's not a really elegant pharmaceutical preparation. But it works and people use it. They use it by sniffing, they sniff the drug. They use it orally, actually,

although it's not quite as effective, and then, obviously, people use it intravenously.

Q. Scott's preferred method of choice was --

A. Intravenous.

Q. -- intravenously. Now take it through for the jury about the chemical hits the bloodstream and what does it do?

A. Well, it's almost an instantaneous reaction. It creates what most users call a rush, very extreme high. Calling it euphoria is an understatement. And that intense feeling, rush that they get, is what they're after. They're after that incredible, unbelievable high that people get. And that lasts for about half an hour. And especially when you first start using the drug, it lasts for about a half an hour. And then once that rush beg ins to dissipate, users will use again, again to get that rush.

Well, interesting thing is that after the

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single injection, the drug hangs around a long time. It has an effect for 13, 14 hours. And somebody's legitimately intoxicated during that period of time from the drug.

Q. Let me stop you doctor, doc. The stuff hits the vein and there's the initial rush, you call it. I think Scott has compared that to an orgasm. Is that a common analogy?

A. Yeah. I've heard people talk about it being like the culmination of a thousand orgasms. It's more intense than what we normally think of as an orgasm.

But I can believe that, that he would say that. It -- it is -- it's so intense, and for years we've always wondered if the drug was pharmacologically addicting; in other words, there was a receptor and if you took the drug off the receptor you would go into withdrawal symptoms. And people instead have labeled it as a physical -- as a psychologically addicting drug and because of that intense, intense high that you get, people seeking that again.

There is now some evidence that would indicate that there is a form of a pharmacological addiction, and it's relatively, relatively new evidence that would say that we changed enough of

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the brain in some parts to drive the use of the drug again. So it's not a classical addiction, but there probably is a lot to the idea that we changed enough of the brain function in certain areas that the person really doesn't have much control over whether or not they go back after that drug again once it starts.

Q. The first 30-minute rush --

A. Yes.

Q. -- I think I interrupted you.

A. That's all right.

Q. As the drug is continued to be used by the individual, does it -- does the 30-minute get longer or shorter?

A. No, doesn't change much. Initially it gets shorter. The longer they use it over a longer period of time, months, for instance, they develop some tolerance to the drug. So they develop tolerance to the rush, to that intense euphoric feeling. And so what happens is they increase their frequency or they increase their dose, which increases the rest of the pharmacological activity, in terms of its toxicity and stuff, and the highs will last longer, the intoxication will last longer.

So there can be some tolerance, and that

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also is characteristic of other drugs that cause an addiction.

Q. You're saying that as the drug use continues, certain parts of the brain have some long-term effects; is that right?

A. Yes.

Q. Tell the jury about that.

A. Well, our brain is a pretty interesting organ. Both white matter and gray matter have neurons, which are responsible for transmission of messages. That's

how we think and that's how we learn to do things and that's how we maintain memory and all of those kind of things. As you use methamphetamine, what we know is that the actual structure of the brain changes. The brain adapts.

As we begin to use the drug -- and the way the drug works, let's just back up just a moment. The way the drug works is it causes a depletion of dopamine and some other transmitters from presynaptic neurons. A neuron is conceptually a gap, okay, and there's a pre-gap or presynaptic and the gap is called the synapse and then there's a post-synaptic part of the neuron. And so it stimulates the release of the drug from the post-synaptic neuron and also prevents the drug from

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being taken back up by the presynaptic neuron, so it has more of an impact on the post-synaptic neuron which is where we get that high and all those other side effects or effects of the drug.

Well, after awhile those neurons change. They begin to disappear. As a matter of fact, you look at morphological studies from postmortem studies and from PET scans and MRI, what we begin to see is their gray matter in the brain begins to decrease in terms of concentration of those receptors, so the brain size even begins to decrease.

And so there's less function there. You know, that gray matter's part of the limbic system, affects other parts of the brain that are more responsible

for things like cognition, executive functions, judgment, you name it.

Q. Decision-making?

A. Decision-making, yes. And as the addiction and the use of methamphetamine goes on, that continues to increase.

Well, when we get to that point, we basically begin to have induced a neurotoxic effect of the drug. All those neurons that we've talked about begin to decrease, and that's a toxic effect,

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side effect of the drug. And that lasts for quite awhile. It lasts forever, as long as somebody's using the substance.

So that really is perhaps, you know, three kind of phases of the pharmacology of the drug, you know, the acute intoxication, the long-term intoxication, the 13 or 14 hours after a dose, and then the chronic piece, which is more neurotoxic in nature. And so it's -- it becomes a very, very dangerous drug.

Q. Would it affect an individual that was suffering from chronic toxicity, chronic use, would it affect that individual's ability to plan?

A. Yeah, those things, all of those cognitive functions that deal with planning, looking at consequences, abstract reasoning, judgment, all of that stuff can

be very much affected by the changes in the -- not only the acute stuff, but especially the chronic, the chronic use in the neurotoxic piece.

We even -- we even begin to see -- now, Japan has more of a problem with methamphetamine than we do. And they've had it for a long time. And so a lot of the new research and stuff that's been done on this drug has been done in Japan, and some pretty sophisticated work.

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They see that 80 percent of patients in -- that they study develop a paranoid psychosis, which is just a side effect, a drug-induced side effect, of this drug, which is a horrible, horrible situation to have, because once somebody has reached that, it's even more difficult for them to make reasonable judgments because reality is quite distorted. And they have, you know, a lot of -- a lot of impact from that, in terms of violence. The violence issues with methamphetamine usually come at that stage of use. When they get into the neurotoxic piece and they become -- they develop a psychosis, drug-induced psychosis, that's when we see the most violence with this particular drug.

Q. Why is that? Why does meth lead to violence?

A. Well, there is some -- there is some thought that what happens is that there's so much damage to the parts of the brain that are responsible for the judgment issues and impulse, that it's just a natural consequence. It almost --

Q. Just what?

A. A natural consequence of the use of the drug. It's almost like, you know, if you grabbed a -- they begin to react as if you were grabbing a hot pot on the stove, your natural reaction is to pull back and

[p.18]

to react to that. Well, their natural reaction to all sorts of stimuli, their paranoid ideation, the thoughts that someone's harming them or coming to get them or whatever the case may be, somebody's trying to steal stuff from them, the KBI is outside, you know, trying to get them, they oftentimes will react to that paranoid thought, whether it's real or not real, and that's what gets them in lots of difficulty and the danger of being violent.

Q. Let me ask you hypothetically for now. An individual becomes a chronic user of methamphetamine, and then, for whatever reason, the drug is taken away. Let's say they're locked up --

A. Yeah.

Q. -- away from drugs, all drugs. Will the brain that's been damaged, perhaps, will it regenerate?

A. Yes and no.

Q. Explain that.

A. Well, people have looked at that, because that question keeps coming up over and over again, do people basically readjust, do their brains readjust, and indeed most people do. Within four, four to five months, most of the symptoms will go away. Sometimes longer. And there are cases in which the -- some of the psychotic stuff, for instance,

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doesn't ever go away. But in most cases, six months, most people are clear, a year at the outside, that people begin to clear up. Their symptoms of depression, their symptoms of, you know, the dysphoric feelings, the issues with memory, their issues with the psychotic thinking, the paranoia, goes away.

Q. Not being able to sleep?

A. Right, not being able to sleep. That's a big one. People have a difficult time sleeping. Obviously, the drug prevents sleep. I mean, people will go on -- when you start using the drug, people as they continue will go on binges that last seven, ten days, where they have no sleep, and that insomnia, sleep deprivation, just complicates their -- their mental picture when you see them, and their likelihood of not being able to make very good executive decisions about what to do in certain situations.

Q. Now, they're deprived of the drug --

A. Yes.

Q. -- perhaps get back something -- to some sense of normal?

A. Right.

Q. Then they're back in the situation where they can

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use the drug again.

A. Yes.

Q. And they use methamphetamine again after maybe a year or two's absence of the drug.

A. Right.

Q. How does -- what happens then?

A. Well, if they've gotten to the point of developing neurotoxicity, once they use the drug again the likelihood of all of those symptoms returning that they had developed comes back very rapidly, sometimes even after the first dose.

So that there -- that is evidence that we, in some cases, rather permanently change the structure of the brain and the person's reaction to the drug. But in any case, you know, most people who've been addicted at that level or been users at that level seek the drug even after being incarcerated for a long period of time.

Q. Let's turn to Scott.

A. Yeah.

Q. You spoke to him. You've looked at this case somewhat?

A. Yes.

Q. Do you have an opinion about how the use of methamphetamine affected Scott in this case?

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A. Well, I found Scott to be a sad but typical case of progressive methamphetamine use. He had progressed very rapidly to the point where he had developed neurotoxicity. He was showing symptoms of psychosis pretty consistently after he started using it, and periods of time when he was incarcerated things cleared up a little bit, but even then when he was incarcerated people were able to notice and to say that he was -- he was psychotic at the time, after admission or incarceration. And he would immediately go back to using, using the drug after he was released, broke parole, and basically was out of halfway houses without following through with the plan, and all in terms of seeking the drug, and even with intents, perhaps, to not use, he would end up using.

And it's very difficult for them not to use when the stuff's around, they're back in an environment when other people are using. So Scott basically was on a downhill course with his drug, and the neurotoxicity had set in. He was using all he could get, all he could -- later all he could manufacture, he

was using. Even to the point of doing some really stupid things, like crawling, you know, obtaining anhydrous and becoming intoxicated

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or toxic from the effects of that substance, which is a very basic caustic substance. None of us would go crawling in a tank or being in a car with an open anhydrous can.

You know, so he was demonstrating all along really stupid judgment kind of stuff. And the issue of reacting to stimuli or potential threats, running away from perceived threats that were not real, being very suspicious of his friends, even suspicious enough to start carrying a weapon. So the drug has had a hard -- a very, very impactful -- a huge impact on him, in terms of the toxic piece. And he continued to use.

The night in question?

Q. Yes, 1-19 of '05.

A. 1-19, in the wee hours of the morning cooking meth in quote/unquote a friend's house, although I'm not sure that that was truly the case, a threat again appeared, a threat that the sheriff and the police or whomever are on its way, not being comfortable with the people he was with necessarily, feeling like they were going to steal stuff, and lo and behold the sheriff shows up.

Scott, Scott was both not only neurotoxic but acutely intoxicated on top of it all, and I

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think that was pretty much a state of affairs for him for a long time. When the sheriff showed, that was -- he had that hand-on-the-hot-pot reaction, and basically, in his own grandiose, indestructible mechanism or way of thinking, was going to shoot it out with the sheriff.

Q. That was influenced by his meth use; is that right --

A. Yes, I think it was --

Q. -- in your opinion?

A. -- very much influenced by the meth use. It was, you know, it was incredibly -- there was no judgment. There was no judgment at all. This man just did it. And, you know, it's -- I've seen it over and over and over again in people like -- like Scott. There isn't -- there is no thought. It's an action, and it's reaction to a threat, real or imagined. It doesn't seem to matter sometimes.

Q. Let me stop you there, doc.

A. Yeah.

Q. There was a second shot in this case.

A. Yes.

Q. Perhaps the jury might be wondering about the second shot and how meth would have influenced that. Do you have some opinion on that?

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A. Yeah. That's a hard one. My sense about these things, and I see that happen as well, and once it starts, it just continues. It's almost like it's a showdown at the OK Corral. People just automatically begin to do those things. Again, there was a perceived threat. He kept shooting. I don't have -- I get the sense, when I talk to Scott and to other people like him, that they never really think about the consequences. There are no consequences. They're terribly grandiose, and, again, infallible. The whole idea that you would sit there and shoot it out with people from a SWAT -- with a SWAT team, I mean that shows absolutely no judgment whatsoever.

So, yeah, I think it's pretty much drug-induced kind of thinking. Their ability to synthesize all this information and to turn that into a rational piece of judgment is just not there at this point.

Q. I think perhaps many of us don't have any idea of what meth intoxication is like, but some of us might have some idea about alcohol intoxication.

A. Right.

Q. Blackouts, not remembering what we've done, not having any memory of certain events that we've done

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while intoxicated. Does that have a carry-over or can you contrast that with meth intoxication?

A. Well, it's really two different kind of things. You know, alcohol is largely a depressant drug. It's short lived in terms of its action. You know, people drink heavily, they have blackouts, they do crazy things that they don't remember. But the effects of the drug goes away once the drug leaves the system unless it's long -- something that lasts for a long, long time; in other words, people continue doing that over and over and over for prolonged periods of time. Then you might be able to see the same sort of morphological changes in the brain that we see with alcohol, except probably in different areas.

In this case, this is perpetual toxicity. It's a stimulant drug. It affects different parts of the brain. And you get different reactions. So, yeah, from an addiction standpoint, there's some similarities, but from a pharmacological standpoint it's very different.

Q. In your opinion, was Scott intoxicated by meth at the time of the sheriff's shooting?

A. Yes.

Q. Did that affect his ability to plan, to premeditate

[p.26]

this crime?

A. Yes.

MR. EVANS: Pass the witness.

THE COURT: Mr. Lind.

CROSS-EXAMINATION

BY MR. LIND:

Q. Sir, you're not a psychiatrist, are you?

A. No.

Q. You're not a neurologist?

A. I'm not.

Q. You're not a physician at all?

A. No.

Q. You are not a psychologist?

A. No.

Q. And you're certainly not a neuropsychologist?

A. No.

Q. You're a pharmacist?

A. Right.

Q. Do you know the standard for voluntary intoxication as a defense to capital murder in Kansas?

A. No, I do not.

Q. Primarily a psychiatric pharmacist deals in drug therapy for psychiatric patients, correct?

A. Yes.

Q. Your primary inquiry in this case was to determine

[p.27]

whether the defendant's drug use had a mitigating influence on his behavior?

A. Correct.

Q. You were hired about six months ago?

A. True.

Q. You mainly work for defendants in death penalty cases?

A. Yes.

Q. You talk about brain damage, that you can see brain changes. You talked about MRIs and PET scans. You did none of those here?

A. No.

Q. You have no pictures of the defendant's brain to see if there were changes, do you?

A. No.

Q. You say that you believe Mr. Cheever was intoxicated. Have you watched or read his testimony from last Friday?

A. No, I have not.

Q. Do you know that he told this jury that he did not black out, and that he had recall of all the events, and that he was conscious of what was going on around him that day and that he was not intoxicated?

A No, I'm not aware of that.

Q. Okay. And he was there on January 19th, 2005,

[p.28]

wasn't he?

A. Yes.

Q. You were not?

A. No, I was not.

Q. You didn't see Scott Cheever until August of 2007?

A. True.

Q. You'd agree that he intentionally shot the sheriff, wouldn't you?

A. I would agree that he shot the sheriff.

Q. Well --

A. If intention means that he picked up the pistol and shot him, pointed it at him and shot him, that's -- I would agree with that. Did he form a -- was he able to think about it and form the -- create an informed decision about it, no.

Q. Again, have you -- you haven't looked at his testimony or read his testimony from last Friday, have you?

A. No.

Q. He testified (as read), "You were conscious you shot the sheriff?" "Yes, sir." "You were aware you shot the sheriff?" "Yes, sir." "You thought in your mind 'Shoot the person coming up the stairs'?" "Yes, sir." "You had the intent to shoot the person coming up the stairs?" "Yes, sir." "Your firing

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the gun at Sheriff Samuels, that wasn't an accident, was it?" "No, sir." "You did it on purpose?" "Yes, sir." "Intentional?" "Yes, sir."

Mr. Cheever says he intentionally shot the sheriff. You disagree with Mr. Cheever?

A. I -- I don't disagree with what he has said in his testimony, obviously. I -- I would find it very difficult to believe that Mr. Cheever formed -- created an intent to do so.

Q. You find it difficult, but he didn't. He said he did.

A. Right.

Q. He testified to this jury he intended to do it, and he did it.

A. Right.

Q. Because he wanted to eliminate the danger of going back to jail. That's what he testified to.

But you didn't --

A. I've not seen that, no.

Q. You didn't look at his testimony.

You talked to the defendant on August 13th, 2007?

A. Yes.

Q. He told you -- did he tell you that day, surely he told you, he intended to shoot the sheriff 'cause he

[p.30]

didn't want to go back to jail?

A. No.

Q. Did you ask him if he shot the sheriff that day?

A. I did. He said he did shoot the sheriff.

Q. And did you ask him why he shot the sheriff that day?

A. Yes.

Q. And he told you he did it to keep from going back to jail, didn't he?

A. No. No, he did not.

Q. Have you watched his video with Dr. Welner or read that interview?

A. No.

Q. Again, in his testimony he said he got it in his head he wasn't going back to jail and he shot the sheriff no matter what the consequences. But you didn't take the time to read that or watch it Friday?

A. No.

Q. He told this jury he got something in his head he's going to do and he does it no matter what the consequences. And he had to shoot the sheriff to eliminate the danger. And the defendant told this jury that, but you disagree with that?

A. I would disagree with the idea that he was able to

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form an intent to do that.

Q. Now, you talked about some of the risks associated with making methamphetamine because of all the chemicals that you -- that you have to handle and you have to mix and work with; is that right?

A. True, explosions.

Q. But the defendant was a risk-taker before -- he was a risk-taker even when he wasn't using methamphetamine, wasn't he?

A. Yes.

Q. He took a great number of risks. He -- we know in his treatment stuff you talked about, when he was in the Girard treatment, he switched rooms. That was a risk and he did it at a time when he wasn't using methamphetamine?

A. True.

Q. Correct?

A. True.

Q. He took a risk in the Stepping Stones halfway house when he was kicked out of there for unauthorized absence and the chronic disregard for the rules?

A. Yes.

Q. He took a risk when he was just a few days from getting out of the Kansas Department of Corrections and smuggled contraband into prison, no matter what

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the consequences. The consequences ended up being ten months, didn't it?

A. Yes.

Q. He took risks when he was younger, too. They were in that social history you said you looked at. He took a number of risks when he was young. He got in trouble for all those, didn't he, before he ever used methamphetamine?

A. True.

Q. In fact, the defendant thought of himself as an outlaw, didn't he?

A. Yes.

Q. And he --

A. According to the history, yes.

Q. Okay. Well, would it surprise you that Friday he testified that he thought of himself as an outlaw, he wanted his friends to think of him as an outlaw as he idolized the outlaw image. That doesn't surprise you because it was in his history, wasn't it?

A. Right.

Q. From the time he was young before he used methamphetamine he idolized the outlaw Mike Gilligan, didn't he?

A. According to the history, yes.

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Q. And that history was taken by the defense, and they were Mr. Cheever's words telling Mr. Bartholome, correct?

A. Correct.

Q. That he idolized Mike Gilligan, an outlaw, before he ever used methamphetamine, correct?

A. Correct.

Q. Would it surprise you that he testified Friday that without a pistol he's shy, quiet guy, but with a pistol he sees himself as an outlaw?

A. I think that he saw himself as an outlaw without a pistol as well. And he's a pretty shy guy without drugs.

Q. All right. And he testified Friday he considered himself an outlaw and outlaws shoot sheriffs. Would it surprise you?

A. No.

Q. Doesn't surprise you because his whole history is replete with instances of him wanting to be an outlaw, aspiring to be an outlaw, wanting the adoration of little outlaws just as he admired the older outlaws, correct?

A. Well, you know, I would disagree with that somewhat. I think that Mr. Cheevers, throughout his entire childhood and young adult history, was an attempt to

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gain some sort of acknowledgment from the world that he was a human being. And this may be a way of doing that. And that if you are an outstanding outlaw, people would admire you.

Q. Well, there are a lot of people who use drugs who don't aspire to be outlaws; isn't that right, Doctor, Dr. Evans?

A. Well, by definition they probably are outlaws if they are using drugs.

Q. But they don't run around aspiring to be, correct?

A. True.

Q. Not everybody who uses drugs or even addicted to drugs is an outlaw that goes around committing other crimes?

A. That's true.

Q. Mr. Cheever chose that life, in addition to the drugs, correct?

A. Yes.

Q. How were you -- when you discussed in August, when you had your discussion with Mr. Cheever, how were you able to confirm what he told you was true?

A. Well, it was corroborated by multiple other interviews that had been conducted.

Q. And the things you reviewed, you listed them in your report, is that what you're talking about?

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A. Yes.

Q. It does not include his testimony from Friday, though?

A. No, does not.

Q. Mr. Cheever's a bright man, a smart man?

A. Yes.

Q. He had a high IQ?

A. That's what his evaluation says, yes.

Q. He's -- well, you know that from his psychological testing, too?

A. That's what I said, yes, that's what I meant.

Q. His neuropsychological evaluation which was done by Dr. Price?

A. Yes.

Q. Who was a board certified neuropsychologist, right?

A. Right.

Q. He has superior memory, correct?

A. Yes.

Q. High-average intelligence?

A. Yes.

Q. Now how do you know that someone like that, when he talked to you, wouldn't be telling you things that he wants you to know or to think?

A. Well, I'm sure he did, but he also told everyone else that evaluated him the same thing.

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Q. Okay. But he told you -- he told you stuff different than he told this jury, because you're hearing some of this for the first time, aren't you?

A. Yes.

Q. You talked about a tolerance. Mr. Cheever used drugs, and as you use methamphetamine you do develop a tolerance, don't you?

A. You do develop a tolerance to the acute effects, yes.

Q. And at times Mr. Cheever told -- and he told you he used large shots of methamphetamine every 30 to 60 -- 30 to 60 minutes, correct?

A. Correct.

Q. And on the day he shot the sheriff, he only used one time.

A. Well --

Q. Correct?

A. Correct.

Q. Okay.

A. But it was 3:00 or 4:00 o'clock in the morning, so --

Q. You're saying he used one time at 3:00 or 4:00 o'clock in the morning?

A. Right.

Q. That's what he told you?

[p.37]

A. True.

Q. It's interesting, some people actually, methamphetamine, they use it for focus, don't they?

A. Yes.

Q. In fact, the method used by Mr. Cheever to cook meth is called the Nazi method, isn't it?

A. Yes.

Q. And that's because in World War II the Germans, German soldiers, were given methamphetamine to increase their focus in battle, correct?

A. Yes, that was the intent.

Q. Okay. Well, and I'm sure that you haven't heard this, but Friday Mr. Cheever testified he was asked questions about a letter he wrote during which time he discussed robbing a bank in Gridley, Kansas?

A. Uh-huh.

Q. And where he drove, developed the plan, drove to the bank, about a mile outside of town he stopped, got his mask ready, got his gun ready, and at that point he injected himself with some methamphetamine to go into the bank and finish the rob.

Now, if he was going to get this 30-minutes of orgasmic high and not know where he is, he wouldn't have done that?

A. I'm not so sure we could say that creates an effect

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where he doesn't know where he is.

Q. So he knows where he is if he shoots it?

A. Sure, he knows where he is.

Q. In fact, it may increase his focus when he goes in that bank?

A. I think we're talking about two different things. I'm talking about a period of time when Mr. Cheever had achieved a neurotoxic effects of the drug that were long-term, not necessarily the benefit or the effects of an acute injection.

Q. Okay. Well, let's talk about the time, because the time period is between December 27th and January 19th, within a month of the shooting of the sheriff that he went to rob this bank.

A. All right.

Q. And he took his father's guns, his stepfather's?

A. Uh-huh.

Q. He left a note saying "I'm going to go rob a bank" and he actually went to the bank.

A. Okay.

Q. But after he stopped and got his mask ready, got his gun ready, then he injected.

A. Uh-huh.

Q. And you said, well, he would know where he is. In fact, it might make him a little more focused when

[p.39]

he went in that bank if he injected.

A. Or braver.

Q. Okay. But focused, too, wouldn't it?

A. I'm not so sure "focus" is a good word here.

Q. He told Dr. Welner that sometimes when he took meth he would actually be able to go out and work on cars for long periods of time, and he would complete tasks on meth. You didn't review that, did you?

A. Well, he also says that he had multiple tasks that he never finished, then stuff was laying all over his apartment in places that he lived, which is very characteristic of methamphetamine use. The intent to have a normal person use the drug to focus is one thing. But you're not talking about the abuse level that Mr. Cheever was engaged in, and to the point when you get very toxic or use the drug significantly, your focus deteriorates and you engage in lots of different things, to the point where you're fascinated by, you know, what's in the book and you don't focus on trying to finish your assignments and all sorts of things like that that

basically say that at a certain point people lose their ability to focus.

Students, in the late '60s and '70s, attempted to use the drug to help them study and to

[p.40]

achieve with getting good grades, and stay up all night to study and what have you. What we found in that result was that their performance decreased because they couldn't focus. So it really kind of depends on this -- this drug is not just black and white. The Nazis may have used it to stay up, to increase their vigilance to focus on the enemy. There isn't any real good evidence it worked, by the way. And then secondly if they ended up into the abuse potential of the drug, I doubt seriously if they could focus very well.

Q. Now, in your report you say that Mr. Cheever was -- he would go about injecting methamphetamine and he would be up to a week without sleep and he would lose appetite, correct?

A. Sure, sure, yes.

Q. You're aware that the day before the sheriff's murder, Mr. Cheever slept for six hours, he woke up about 6:00 p.m. on January 18th, 2005, and he ate, according to what he calls, a big old meal of casserole and cherry cobbler. You're aware of that?

A. No.

Q. Okay. That's what he told Dr. Welner. I guess if you'd read that interview, you'd know that.

A. I don't remember that piece of Mr. Welner's report.

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Q. You didn't know that, okay. He told you that he carried a gun, began carrying a gun and carried it most of the places that he went, correct?

A. Yes, yes.

Q. And he testified here that he carried a gun and he had a choice between a .22 and a .44 'cause he stole them both and he carried the more powerful .44. You're aware of that?

A. Yes.

Q. In fact, on January 18th, again the day before, Mr. Cheever had that .44, the same one he used to kill the sheriff with, and he testified that he'd been to -- living -- he was in El Dorado and he saw what he believed to be a KBI or an FBI agent. You understand that's Kansas Bureau of Investigation --

A. Yes.

Q. -- a police officer, law enforcement?

A. Uh-huh.

Q. -- or the Federal Bureau of Investigation. He called them the "red ranger." And he testified that he was

way out there, and that he freaked out and totally panicked, but amazingly he didn't kill him.

A. No.

Q. So it wasn't just he saw a threat, freaked out, was way out, panicked, but he didn't kill the red ranger

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the night before. Did you know that? Did you know about the red ranger?

A. Yes.

Q. You talk about the weighing and the consequences. Mr. Cheever's up there in the house in the Cooper house, and they tell him that the police are on the way. He wrote a letter in February of 2005 to Crystal Mackey where he says, "Anyways, he tried to get a front and call the cops" -- he's speaking about Billy Nowell -- or "get the cops called, thinking I'd just roll over and take it. I seen that shit coming for about five hours, so I said fuck it, gonna have to shoot me." (As read.)

That's weighing -- that's weighing and thinking of the consequences, isn't it, "If I don't leave, they're going to have to shoot me 'cause the cops are coming," right?

A. That's after the fact, yes.

Q. But it demonstrates that he's saying he weighed the consequences that day, isn't he?

A. Well, that's what it's saying, but it also very consistent with the grandiosity associated with this guy.

Q. Well, he testified Friday that sometimes he'd get things in his head, and he'd just do it no matter

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what the consequences.

A. Uh-huh.

Q. Grandiosity and bravado. He had grandiose thoughts, you say? Was that present only when he used methamphetamine?

A. No. I don't think so. I think it was, excuse me, yes, it was present.

Q. Only when he used methamphetamine?

A. No. No, I think it was there -- the grandiosity was obviously there a lot because he was attempting to achieve some sort of recognition. He was Billy the Kid kind of character. Obviously, that is made worse by the use of a drug like meth.

Q. But the bravado and the grandiosity --

A. Right.

Q. -- that's all there, that's part --

A. It's all there and also it was a side effect of the drug.

Q. But originally it is there 'cause that's Scott Cheever, that's part of his personality?

A. Certainly it could be, yes, certainly is.

Q. Well, the outlaws were his idols before he ever used meth, correct?

A. Exactly.

Q. And he learned to rob banks by reading a book about

[p.44]

John Dillinger; that's where he got the idea, isn't it?

A. Yeah.

MR. EVANS: Objection, Judge. This is beyond the scope of direct.

THE COURT: Sustained.

BY MR. LIND:

Q. In fact, he continued this bravado after he was arrested and put in jail?

MR. EVANS: Same objection, Your Honor.

MR. LIND: Your Honor, I think they brought it up in direct.

THE COURT: Overruled.

BY MR. LIND:

Q. He wrote a letter to Nathan Fife, said, "Fuck 'em, I'm still an outlaw till they bury me."

A. (Nodding affirmatively.)

Q. In the same letter where he said, "I was gonna burn him and Carol out of Virgil but I had to shoot the sheriff instead"?

MR. EVANS: Same objection, Judge.

BY MR. LIND:

Q. That continued -- that's part of when he --

THE COURT: Just a minute, Mr. Lind.

MR. LIND: Sorry, Your Honor.

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THE COURT: Overruled.

BY MR. LIND:

Q. That's part of what he's saying when he's in jail and not using methamphetamine?

A. Well, again, I go back to the idea that -- and I don't know when this letter was written. But if it was written within the first six months of his incarceration, I would suggest that he was still under the influence of methamphetamine.

Q. In your report you say violence is not unusual for methamphetamine addicts. That's what you said, correct?

A. Yes.

Q. It's also not unusual for somebody with an antisocial personality, correct?

A. True.

Q. And actually there's a 2006 study in the Journal of Drug Issues that says -- it's a study entitled Methamphetamine Use and Violence -- that the great majority of those who have used methamphetamine are not prone to violence.

Have you read that study?

A. No, I have not.

Q. It was cited in Dr. Welner's report but you didn't read it?

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A. I didn't read that one, no.

Q. And, of course, others at the Coopers' house that day who were using meth, including Darrell and Belinda Cooper, Billy Nowell that day, or Matt Denny, none of them got violent that day. You're aware of that?

A. I'm aware of that, yes.

Q. Mr. Cheever's the only one that got violent that day?

A. Yes.

Q. You talk about impulsive decisions. Was it impulsive for Mr. Cheever to stand in the north bedroom upstairs -- are you familiar with the house at all?

A. Only that I know that there was an upstairs and the stairs went to the kitchen.

Q. Was it impulsive for Mr. Cheever to stand just inside the north bedroom door with a .44, cocked, single action so he had to cock it so it would shoot --

A. Uh-huh.

Q. -- and listen and hear the sheriff move downstairs and wait, a sheriff he knew and who knew who it was, a sheriff who he testified had been nice to him his whole life --

[p.47]

A. Uh-huh.

Q. -- was it impulsive for him to sit there and wait inside that door and listen to him come up the stairs and know that once he got to the landing he could step out, raise the gun, aim and fire and shoot him? That's an impulsive decision according to you?

MR. EVANS: Judge, could we have one question at a time? I object.

THE COURT: Do you need that broken down a little bit?

THE WITNESS: It would be useful.

THE COURT: All right. Why don't you break it down a little bit, Mr. Lind.

BY MR. LIND:

Q. Is it impulsive for him to say, "I better stand here and be quiet 'cause the sheriff's downstairs"?

A. That's not an impulsive act.

Q. Okay. Was it impulsive for him to then tell Mr. Denny to be quiet because the sheriff's downstairs and he doesn't want to give himself away?

A. That's not an impulsive act.

Q. Was it impulsive for him to cock that gun so it was ready to fire?

A. That's not an impulsive act.

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Q. Was it impulsive for him to stand there, inside the doorway, so if anybody came up the stairs they couldn't see him?

A. Not an impulsive act.

Q. Was it impulsive for him to listen to the sheriff come up those stairs until he reached the landing?

A. No.

Q. Was it impulsive for him to step out then at that point, raise his gun and shoot the sheriff?

A. No, that's not impulsive. It is, however, a -- very much an executive decision that he made that he created -- that involved judgment that was impaired.

Q. We'll come to executive decisions in a minute.

A. Okay.

Q. Okay? Was it then impulsive for him after he fired that one round at the sheriff, striking him in the center body mass, center mass --

A. Uh-huh.

Q. -- was it impulsive for him then to retreat inside that door again, where he has cover, and talk to Mr. Denny?

A. No.

Q. Was it impulsive for him then to step back out and look for the sheriff, not seeing him, and then retreat back behind cover?

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A. No.

Q. Was it impulsive for him to then step out, not see the sheriff, walk over to the railing, and see him down below? Is that an impulsive act?

A. No.

Q. Was it impulsive for him then to, once he saw the sheriff, bring the gun up, it's already cocked, he has to cock it again, aim, and fire a second shot at the sheriff, who wasn't advancing against him anymore? Is that impulsive?

A. No.

Q. You say that the defendant demonstrated significant cognitive defects especially related to his executive functions. You were talking about that just a moment ago?

A. Yes.

Q. You define those abstract reasoning, planning and behavioral flexibility?

A. Right.

Q. But you administered no testing on August 13th, 2007, did you?

A. No.

Q. But you have reviewed the neuropsychological evaluation done by Dr. Randall Price?

A. Exactly.

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Q. Dr. Price, on August 9th, 2005, two years before you, who was a board certified forensic psychologist and neuropsychologist, he did testing and issued a report, didn't he?

A. Yes, he did.

Q. And that's something that you have reviewed?

A. I have.

Q. In fact, you listed that as something that you used as a basis to make your opinions?

A. Exactly.

Q. He found no neuropsychological deficits in Mr. Cheever?

A. Okay.

Q. Correct?

A. Correct.

Q. He found that the defendant had high-average executive functioning.

A. Okay.

Q. Correct?

A. Yes.

Q. He said his basic cognitive flexibility was in the 89th percentile, a very high average.

A. Yes.

Q. He said the defendant's response inhibition, which is ability to think about complex cognitive

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functioning and executive processing, all the things you just talked about, Mr. Cheever rated in the high average, didn't he?

A. Yes.

Q. So all of your opinions and findings are contrary to what Dr. Randall Price found --

A. Yes.

Q. -- along those areas?

A. And his testing was approximately seven to eight months after the incident.

Q. And yours was two years following his, except you did no testing, you just rendered an opinion?

A. I rendered an opinion, yes.

Q. And you did no testing?

A. No, did no testing.

Q. His testing was two years prior to yours?

A. Right. But the point in not testing is the fact that the neurological changes that the drug causes in neurotoxicity certainly would have abated during that period of time. No one did any testing immediately after the incident.

Q. Your report also says that he would not only have problems with executive functions, but you also say that decrements to working memory are consistently seen from chronic and acute use of methamphetamine.

[p.52]

A. Yes.

Q. You agree that, though, the defendant has a superior memory, wouldn't you?

A. Not necessarily, no.

Q. Well, you didn't read his testimony from Friday, when he sat here and told us everything that happened. You didn't read that testimony, did you?

MR. EVANS: Judge, objection. I got this at 9:00 o'clock this morning. How could he have read this

testimony? Objection to that. It's been mentioned repeatedly and I'm not sure how we could have accomplished this.

THE COURT: Well, I think your point is noted. The jury understands that. You may proceed.

BY MR. LIND:

Q. You didn't watch the live feed on the Internet Friday either, did you?

A. No, sir, I did not. I didn't know there was a live feed on Friday.

Q. And once again, Dr. Price, the neuropsychologist who tested Mr. Cheever, found that he had a superior memory, didn't he?

A. Yes.

(Whereupon, a sotto voce discussion was

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had among Mr. Lind, Mr. Disney and Mr. Welch.)

MR. LIND: I've no further questions, Your Honor.

THE COURT: Mr. Evans, are you going to have some redirect?

MR. EVANS: Some, Judge, yes.

THE COURT: Okay. Ladies and gentlemen of the jury, let's take the morning recess.

And, Dr. Evans, you may step down for now.

THE WITNESS: Thank you.

THE COURT: Thank you. Just remember the admonition that I've given you all along, do not discuss the case among yourselves, do not let anyone discuss it with you, do not form or express any opinions about the case. We'll be in recess for about 15 minutes. Thank you.

(A recess was taken from 10:12 to 10:32 a.m.)

THE BAILIFF: Please rise.

THE COURT: Please be seated. Thank you.

(Witness resumes witness stand.)

THE COURT: Mr. Evans and Dr. Evans, you may proceed.

MR. EVANS: Yes, sir.

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THE WITNESS: That is confusing.

REDIRECT EXAMINATION

MR. EVANS:

Q. Let me just go a few places with you, Dr. Evans. Mr. Lind took you through a series of questions about impulsivity.

A. Yes.

Q. Scott's impulses. What do you say to that?

A. Well, there is no doubt that part of Scott's characteristics and the substantive use, he has historically done very impulsive things as a matter of reacting to a stimulus. I don't think this is a case in which, when he shot the sheriff, that it was necessarily an impulsive act. It was a very, very poor decision. He wasn't able to weigh the consequences. I mean, my Lord, any sane person would know if you're surrounded, you got folks down there, shooting the sheriff is not going to get you out of jail. Just the opposite.

So his judgment is horrible here. And it is very consistent with the kind of psychotic thinking. His thinking is just not intact. It's not real at that juncture.

So, you know, this is a different phenomena than just somebody being impulsive. Yeah, Scott's

[p.55]

impulsive. He's been impulsive his entire life. But that's not necessarily everything that was going on at this juncture.

Q. Now, testing. If he could have been tested soon after the incident, would that have had some value?

A. Yes. As I indicated earlier, some of the long-term effects of this drug would have mitigated by then. You know, in a number of months, four to, as I stated earlier, six to 12 months you could see some clearing of the effects. Testing is not in any -- in any case, testing, is predictive of gross neuropsychological changes. It's not surprising that Dr. Price wouldn't have found any at eight months, seven or eight months, after the man was evaluated. I mean after the incident. So I'm not sure that any testing at that juncture would have been, although appropriate, I mean typical psychological testing, looking at personality and diagnostic issues that would tell you more about the individual at that point in time, yeah, that's relevant. It gives you information. But to give -- to be able to use that information to say, yeah, there is -- there are significant changes in his neuropsychological functioning, it may or may not be very helpful.

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Q. When you saw him this last August, did you see evidence of this abatement of toxicity?

A. He was sleeping. Yes, I did. He was sleeping. His mood was appropriate. His mental status was very appropriate. I didn't see a great deal of symptoms that was suggestive of a lot of grandiose thinking. He had put the whole thing in perspective. He'd gained some insight into what had happened. So I think there were changes.

I mean, he looked pretty normal, really, when I saw him in August.

MR. EVANS: That's all, I have, Judge.

THE COURT: Anything else, Mr. Lind?

MR. LIND: Just a couple, Your Honor.

RECROSS-EXAMINATION

BY MR. LIND:

Q. So, sir, what you're saying is when he testified that he had the intent to shoot the person coming up the stairs, that was just a poor decision and you're saying he didn't weigh the consequences?

A. Exactly. He was responding to the threat.

Q. Uh-huh. And he eliminated that threat?

A. Yes, he did.

Q. The neuropsychologist, Dr. Price, who you say did the testing and probably it wasn't any good, you

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have his report, you know that he was actually employed by the defendant's lawyer at the time, not by the government, the State?

MR. EVANS: Objection, Judge. Wasn't employed by me.

THE COURT: I'll sustain the objection.

MR. LIND: I said his lawyer at the time, Your Honor.

THE COURT: I'll sustain the objection. Let's move on.

MR. LIND: I have nothing further.

THE COURT: Okay.

MR. LIND: Thank you.

MR. EVANS: Nothing further based on that, Judge.

THE COURT: Dr. Evans, you may step down. Thank you.

THE WITNESS: Thank you.

(Witness excused from the witness stand.)

MR. EVANS: Defense rests, Judge.

THE COURT: Is the State ready to proceed with rebuttal testimony?

MR. LIND: We are, Your Honor.

THE COURT: Okay. You may call --

MR. LIND: State would call Dr. Michael

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Welner.

THE COURT: All right.

(Bench conference out of the hearing of the jury.)

THE COURT: Okay.

MR. EVANS: Judge, we would object to Dr. Welner's testimony. I'm back to my argument. I know you've sort of ruled on it, but Dr. Welner is improperly in this state case. We've not filed anything that would have given him access to Cheever, no Notice of Intent to mental defect or disease that would have given them access in state court, but we didn't file that so he shouldn't have had any access to Cheever, and the only way to cure that is to not let him testify.

THE COURT: Now, his access was as part of the federal case, correct?

MR. EVANS: Yes, sir.

THE COURT: At which time was there a different defense besides voluntary intoxication on the table?

MR. EVANS: I think they were also arguing mental disease, dysthymia.

MR. LIND: They were -- actually, their defense was voluntary intoxication. However,

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their expert at that time, Dr. Smith, also said that. But, Your Honor, I would point out also that the defense has put on evidence this morning of mental defect on Mr. Cheever's part when they -- their expert talked about the changes in his brain due to neurotoxicity. That's a mental defect.

THE COURT: Well, I assume Dr. Welner is going to address the issue of -- is he -- well, tell me what he's here to say, basically.

MR. LIND: He's going to say that he examined Mr. Cheever and that Mr. Cheever has an antisocial personality, which would take into account these actions and explain his actions on that day. And that he's going to say he looked at the possibility of intoxication as a defense. He's going to explain Mr. Cheever's movements that day and his actions with regard to more in line of someone with an antisocial personality rather than someone who was intoxicated. It directly rebuts their defense of intoxication.

THE COURT: And your point is that -- I mean, what would have prevented the State from hiring Dr. Welner in this case rather -- if there had never been a federal case? Couldn't they have

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done the same thing here, anticipating a voluntary intoxication expert witness?

MR. EVANS: They could have, but he wouldn't have had access to Cheever in the jail. He wouldn't have had, you know, a 230-page transcript and interview with him, taped. He's gotten access by virtue of his --

THE COURT: Was there an order of Judge Belot, I assume, that gave him that access in the federal case?

MR. LIND: There was, Your Honor.

THE COURT: Okay.

MR. LIND: But, again, Your Honor, they put on evidence this morning of a brain defect on the part of Mr. -- a mental defect, being the changes in his brain, this morning. That would have given us access to it, to the defendant.

THE COURT: Well, I mean, in your typical mental illness case -- of course, there's a statutory scheme in Kansas for that, too. The defense has an expert and the State can have an expert. And you're

arguing that voluntary intoxication is a different animal?

MR. EVANS: I am, Judge.

THE COURT: That you don't get access --

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MR. EVANS: You don't.

THE COURT: -- on voluntary intoxication.

MR. EVANS: Absolutely not.

MR. DISNEY: But we did nothing, absolutely nothing, wrong in the federal case.

THE COURT: I understand that.

MR. DISNEY: Under the federal rules.

THE COURT: Right.

MR. DISNEY: And their expert that just testified relied upon Welner's report. He testified, "I relied upon Welner's report," and this is Welner.

THE COURT: So Dr. Evans, who just testified, relied to a certain extent on Dr. Welner's report?

MR. EVANS: That's true, he did.

MR. DISNEY: Yes.

THE COURT: Okay. Well, I think that fact alone probably allows the State to call him to give his own point of view. And as long as you stay targeted on debugging the voluntary intoxication defense, but if you get far afield from that, I think I may have some trouble with that.

Who's going to handle this witness?

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MR. LIND: I am, Your Honor. We intend to go through his evaluation of Cheever, because he evaluated him -- he didn't go in and say, "I'm looking at one item." He went in and said, "I'm looking at Mr. Cheever to see what's here."

So he's going to talk about things that he both counted and discounted, but he's going to ultimately say most of these actions can be explained by his antisocial personality, rather than by intoxication, which directly rebuts their defense.

MR. EVANS: I don't think Evans presented any psychological view of antisocial personality. He talked about meth, Judge, and how meth, you know, affects an individual and how he thinks it affected Cheever, so I think to go into antisocial personality disorder and psychological testing is clearly beyond the scope of what we presented.

MR. LIND: But the neuropsychological testing is another thing that Evans relied on, and he discounted Dr. Price but he listed that as something he relied on.

MR. EVANS: He looked at it. He said he didn't see anything in the testing that would indicate a brain problem. I mean --

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THE COURT: Your expert witness that's on the stand right now is a much more comprehensive expert, I would assume, than -- I would say -- than Dr. Evans, from the standpoint that he did an evaluation.

MR. LIND: Yes.

THE COURT: He did some testing.

MR. LIND: Yes.

MR. EVANS: And it's my understanding, I don't know that it has anything to do with it, Judge, but it's my understanding that we're going to see him again at second stage, where he could talk about arguably some of these things.

MR. DISNEY: But all the --

THE COURT: I think the State certainly is entitled to rebut the voluntary intoxication defense. I'm not arguing that point. But I'm just kind of thinking to myself, I mean I don't know what his report says, I've never been provided his report. And I don't know how extensive his contacts with Mr. Cheever were. I guess I'm going to hear that he conducted lengthy interviews and did battery of tests on him.

MR. DISNEY: And ultimately, I mean, it will rebut the voluntary intoxication, which is

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why he's come along, to say that, no, this wasn't a result of voluntary intoxication.

THE COURT: His bottom line basically is he did these things because of his antisocial personality, not because his brain was impaired by methamphetamine?

MR. DISNEY: Exactly.

MR. LIND: Yes.

THE COURT: Well, I think your point is well made, I mean in terms of preserving it for the record, Mr. Evans. I will allow the State to proceed at this point with their expert witness. So --

MR. DISNEY: Thank you.

THE COURT: All right.

(Thereupon, the following proceedings continued in the hearing of the jury, with the defendant present.)

MICHAEL WELNER, M.D.,

having been first duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

THE COURT: Tell me your name again.

THE WITNESS: My name is Michael W-E-L-N-E-R.

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THE COURT: Okay.

DIRECT EXAMINATION

BY MR. LIND:

Q. Dr. Welner, you -- obviously you're a medical doctor. What -- what do you do for a living?

A. I'm a psychiatrist and forensic psychiatrist.

Q. Okay. Are you board certified in any field?

A. I am. I'm board certified in psychiatry, forensic psychiatry, advanced clinical psychopharmacology and disaster medicine.

Q. And what is forensic psychiatry?

A. Forensic psychiatry is the intersection between psychiatry and the law. In a variety of different legal areas, certain psychiatric questions come up, and they form a unique relationship between psychiatry and the law as they would some other sciences also. Forensic pathology is the interface of pathology and the law. So forensic psychiatry is the interface and connection of psychiatry and the law.

Q. And what is psychopharmacology?

A. Psychopharmacology relates to medications and drugs, and other kinds of physical treatments and their relationship to psychiatric illness.

Q. And what's disaster medicine?

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A. Disaster medicine is a clinical specialty that relates more to the psychiatric needs and indeed the medical needs that communities have in the aftermath of a disaster. That is more of a clinical interest than a forensic one.

Q. What does it mean to be board certified?

A. Board certified requires a demonstrated proficiency, depending on the different area. In psychiatry board certification, for me, required an oral examination and a written examination. In forensic psychiatry, board certified required a written examination to demonstrate a proficiency, as well as a requirement of experience. And it also requires a recertification in forensic psychiatry every ten years, and I achieved that recertification last year after having been certified for the first time in 1996.

In psychopharmacology, because medicines and drugs are changing and what we come to learn is so dynamic, the -- there is also recertification requirement, but it's more frequent, and recertification is done every five years. And so my initial certification was in 2002 in psychopharmacology and I recertified this year, and that's also by a proficiency and written

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examination.

Disaster medicine is a written examination certification in a variety of areas of not only psychiatry but also areas of medicine as well.

Q. And, doctor, after you graduated from medical school, did you do a residency?

A. I did.

Q. Where did you do that?

A. I did my residency in New York at Beth Israel Medical Center in Manhattan, rotating internship, first in medicine and emergency medicine and psychiatry, and then completing a residency in psychiatry at Beth Israel.

Q. I apologize, I didn't ask. Where did you go to medical school?

A. Went to medical school at the University of Miami in Miami, Florida.

Q. Okay. After -- what is a residency, when we talk about that? You did it in New York. What did you do? What is a residency?

A. A residency is when you what we commonly appreciate as specialization. We know people who went to medical school that get medical training and they come out of it with an M.D. This person

decides he's going to go into surgery. This person decides

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he's going to go into radiology. This person decides he's going to go into psychiatry. He -- each person would then do respectively a medicine residency, a radiology residency, a psychiatry residency. So it's -- it reflects subspecialty training that gives you focus and further development in a particular area as a physician.

Q. And after you did your residency, did you do some follow-on training?

A. Yes, sir.

Q. And what is that called?

A. A fellowship. What we've come also in medicine, in recent decades, not so much recent years anymore, is a phenomenon of subspecialization that knowledge is so particularized that there are -- there's additional training even beyond residency that you may take up, and in my case I did a fellowship at the University of Pennsylvania in forensic psychiatry, and extending the training that I could get in residency.

Q. And where did you practice? Did you go into practice after your fellowship?

A. Yes.

Q. Where?

A. I entered practice in 1992 in full-time private

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practice and at the same time I also had a full-time attending physician position at Bellevue Hospital in Manhattan, in New York, New York, Bellevue being a large city hospital, working on the corrections psychiatry unit, and the corrections psychiatry unit being a place where people who had been charged with crimes, after being arrested, were brought in. If they had special emotional needs or if they had psychiatric conditions that needed treatment, you wouldn't necessarily send them to a traditional hospital because of security concerns, and also because of concerns that are unique to a corrections population. There's certain things that someone under arrest, going through that experience, it's particular to those populations that I might not necessarily see in my outpatient practice.

Q. Do you hold any academic or teaching appointments?

A. I do.

Q. And where are they?

A. I'm an Associate Professor of Psychiatry at NYU School of Medicine. That's New York University School of Medicine. And I'm an Adjunct Professor of Law at Duquesne University School of Law at Pittsburgh State, Pennsylvania.

Q. What do you do at NYU?

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A. At NYU and at Duquesne my responsibilities are primarily teaching. The responsibilities at NYU focus mostly around the medical student program, supervising directly as well as teaching classes, primarily in forensic psychiatry but also, depending on the semester, in psychopharmacology as well.

At Duquesne my responsibilities, again, are periodically teaching at academic conferences that they have in the forensic sciences. Duquesne has a forensic sciences program, not only with the law school but also tied in with the rest of the university, and I'm on the board of advisors. And it's a very active institute, with a lot of planning and programs, and I've been involved with that since its inception.

Q. Are there any special considerations required to maintain such an appointment?

A. Well, NYU is a -- is really quite a talented department of psychiatry. They're outstanding colleagues that I have there and it's sort of like if I were to be on an athletic, competitive athletic team. You have to bring something to the table in order to be part of that department. So the demands are that you have a special expertise that you can contribute to the department, because it is such a

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competitive environment.

Q. What's your primary professional position?

A. My primary professional position is in practice, in private practice, that I maintain in New York and as chairman Of The Forensic Panel.

Q. What is The Forensic Panel?

A. The Forensic Panel is a national practice that consults on forensic matters in psychiatry, toxicology, neuropsychology, pathology, and areas of medicine, and does so with a peer-reviewed oversight format.

Q. What do you mean by peer-reviewed oversight?

A. Peer review is an idea that has been present in a variety of different forms of academic life, in publishing, in regulation, in which one person has an opportunity to look over another person's work and critically assess its merit or its depth in one way or another.

The peer review of The Forensic Panel is an adaptation of putting oversight into everyone's work, so that if I do -- if I perform an assessment, colleagues, who have exceptional qualifications and have expertise a little bit different from my own, can look over my shoulder and regulate and make sure whether the work is sufficiently diligent, whether

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my opinions are objective, and whether the conclusions that I make are consistent with standards of the field of that particular science.

Q. And that's basically how it operates in The Forensic Panel?

A. That's exactly how it operates in The Forensic Panel.

Q. How do you select who's going to do the peer review?

A. Well, it depends on the case. In a case, for example, such as this in which there are questions of psychiatry and the interface of psychiatry and drugs, then medical toxicology input is helpful, particularly if that medical toxicology expertise goes beyond what a psychiatrist most frequently encounters.

In this case, and perhaps I'll discuss later, in the course of my evaluation one of the decisions that I made in doing psychological testing, I thought it was helpful to have someone peer reviewing me whom I felt I had a lot of confidence in their level of expertise in psychological testing.

Q. Who were some of the people you have at The Forensic Panel?

A. The members of The Forensic Panel include the

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Associate Director of the National Library of Medicine. In fact, he was the -- one of the people who peer reviewed me on this case. Vice-chairman of the Department of Psychiatry at Baylor University, in Texas. The Text Editor of DSM-IV-TR, which is the psychiatric diagnostic manual. The Chairman of the Department of Psychiatry at Queens Hospital, the Chairman of the Department of Psychiatry -- I'm sorry, Chairman Emeritus, retired now, of the Department of Psychiatry at NYU. The medical examiners of Maryland, the Chief Medical Examiner of the State of Maryland, the Chief Medical Examiner of the State of Hawaii. And a number of other colleagues that I've encountered that I have a very high regard for their work.

Q. And you also supervise in training students at The Forensic Panel?

A. We do and I do.

Q. Okay. What type of students do you do?

A. Typically students who are -- who are studying forensic psychology and -- but we do also supervise medical students at NYU, rotate there, and occasionally people who are Ph.D. candidates, depending on the program and the nature of the requirements of where they're doing their training.

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But interns do come to us from not only around the United States but also we've had a number of interns come and rotate from institutions in Europe.

Q. And have you lectured at different groups and educational conferences?

A. I have.

Q. On what type of topics?

A. On a range of topics within the intersection of psychiatry and law, as well as medication and psychopharmacology issues.

Q. And have you been the keynote speaker at a number of conferences?

A. I have. I've been an invited lecturer at a number of settings and a keynote for the American College of Legal Medicine, for the Nebraska Institute of Forensic Sciences, an invited speaker at the International Bar Association in Dublin, the American Society of Clinical Psychopharmacology, and the section in this area of the American Bar Association, as well as the American Academy of Psychiatry and the Law.

Q. Are you a member of any editorial boards?

A. I am.

Q. And have you been an editor yourself?

A. I have been.

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Q. Okay. What member -- what editorial boards are you a member of?

A. I'm an editor on the Editorial Board of the Encyclopedia of Forensic Sciences, which is a reference text put out by Academic Press. Actually, I'd love to have my CV in front of me, just so that I could refer to it.

Q. I'm sorry, Doctor.

A. But what immediately comes to mind is -- that's the editorial board position that immediately comes to mind.

Q. Okay. And have you authored a number of articles in chapters and books on -- in your field?

A. I have. For five years I was editor in chief and published a periodical called The Forensic Echo, which was subscribed to by attorneys, other practitioners and people who would -- we would be covering the intersection of psychiatry, the law and public policy, and so in addition to editing I also wrote for -- wrote extensively for that publication.

In addition to that, I have published a number of chapters and other articles that have appeared in other areas in the scientific literature.

Q. And have you received a national award for your

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teaching?

A. I have.

Q. From who?

A. I received an award from the American Psychiatric Association for excellence in medical student education.

Q. Can you give an approximate breakdown of your professional time?

A. At this time I would say 35 percent of my time is in consulting and in reviewing matters such as this, psychiatric legal matter. 15 percent of my time is spent treating patients. 15 percent of my time is in conducting original research. Approximately 15 percent of my time is spent in -- or I should say 15 to 20 percent of my time is spent in supervision of other colleagues, and the balance of my time is spent in different teaching and writing activities.

Q. What areas have you researched?

A. For seven years I have been coordinating research of something called The Depravity Standard, which is an effort to distinguish, in an evidence-based fashion, the worst of crimes. Very complicated topic, but something that I'm proud to say was featured in the Crime Classification Manual that has been put out by the FBI and updated this year, in fact.

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I have also been researched and just published a chapter on research in drugs that are used by sex offenders to exploit victims. They call the phenomenon drug-facilitated sex assaults; so in other words, people who use drugs to immobilize their victims and then take advantage of them, something that we often hear about, say, on college campuses or that kind of thing.

And I've also researched the phenomenon of false and disputed confessions.

Q. And have you consulted or testified before various state legislatures about psychiatry and the law?

A. I have.

Q. Which state legislatures have you testified in front of?

A. Texas and Pennsylvania, testified before the legislative judiciary committees about the standard that was being devised for mental retardation as it relates to sentencing questions, and testified before the New York state legislature about video game violence and its impact on -- or video game violence and its impact and influence on other violent choices that adolescents make as they get immersed in it.

Q. Now, focusing on your forensic consultation work,

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what percentage do you work for the prosecution, what percentage for the defense?

A. It differs in any particular month, but I would say that, based on my current roster, about 40 percent of the time I'm consulting to requests made by defense attorneys and 60 percent to prosecution.

Q. Have you consult -- you consulted in a wide variety of states , a number of states?

A. I've consulted in, I believe, approximately somewhere between 25 and 30 states.

Q. And have you consulted in the state of Kansas before this case?

A. On a civil matter, not on a criminal matter. I believe it was a question of competency that came up in connection with a person's estate and a will, and a question of whether an elderly person was unduly influenced, given the history.

Q. And as part of your forensic psychiatry practice, have you been called upon to conduct an evaluation of someone charged with a crime to determine the issues and render an opinion on whether this person's substance abuse and its relationship to criminal responsibility at the time of the crime?

A. I have, on a number of occasions.

Q. Have you worked on cases involving methamphetamine

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and its -- the assessment of its role in a crime?

A. I have worked on cases of methamphetamine, and I've also treated patients in my private practice who in the course of their lives have used methamphetamine and were able to explain and give their own impressions of how they were affected by it.

Q. And when were you retained in this case?

A. In two thousand -- I believe in late 2005.

Q. Okay. And this is your third trip to Kansas?

A Yes, it is.

Q. And obviously you charge a fee for testifying, for your work, I should say, as a forensic consultant?

A. A forensic consultant will charge for the time that one spends on a case, and that typically relates to an hourly fee.

Q. And what is your hourly rate for consultation, forensic consultation?

A. My hourly rate when I'm working on an agency-related case is discounted from a customary rate. My customary rate is 550 an hour. And when I work

in connection with agency-related cases, both defense and prosecution, that is 400 an hour.

Q. Do you have a rate for testifying in court?

A. The -- for my time to go to another location for deposition or for testifying, my rate is 2750 for --

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I'm sorry, for a full day, it is approximately 4750, I believe.

Q. Okay. Now, Dr. Welner, can you explain, how does a clinical setting differ from a forensic setting?

A. When someone comes to you with a problem as a clinician, if I'm a psychiatrist offering you treatment, I operate under the presumption of trust. You're coming to me to get well and so I listen to everything that you have to say at face value.

When you are evaluating a case in a forensic setting, you're operating under a presumption of caution, because it's a dispute. One side has one opinion, another side has another opinion, and people are very much invested in their ideas, for whatever reason, and so you listen but you have to listen with a certain sense of caution, with an awareness that there may well be more to the story. That's not the kind of challenge that I have to worry about the rest of the story in a clinical setting when someone is simply coming with a depression or an anxiety or even a chemical dependency problem and simply wants to get well.

Q. What were you asked to evaluate in this particular case?

A. In this particular case I was asked, among other

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things, but I was asked to assess the relationship of methamphetamine and Scott Cheever's use of it on January 19th, 2005, to his killing Matthew Samuels. I was also asked to evaluate and assess Scott Cheever's ongoing methamphetamine use and his -- and the effects of that use, and to what degree that ongoing use over all of that time related to his behaviors in killing Matthew Samuels.

I was also asked to offer an opinion about his perceptions, his decision-making, his ability to control his actions on January 19th, 2005, and to what degree the available information that I could gather from a variety of sources would inform my understanding of his capabilities or his impairments, either in perception, ability to control or make decisions at that time.

I was also asked that, given his history and his explanations, his choices, what alternative explanations, including diagnoses, would account for what he did, in addition to or as an alternative to, possibly, the role of methamphetamine.

Q. Okay. How did you go about -- how do you go about doing an evaluation like this?

A. Well, every evaluation is different, and the evidence that a forensic psychiatrist gathers is

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really dictated by what you've come to learn up until that point, the first point of just following evidence and history and information as it dictates and relating it to what we understand in the medical literature. In other words, what do we understand about methamphetamine when it is used, what do the standards say about what is intoxication and how does methamphetamine affect people in an acute setting, and how does it relate to the history that he gives, and from a variety of sources. And from those initial sources, who could tell me more, where could I learn more to help resolve this question of what actually was going on there the 19th. Then trying to corroborate, trying to get information that is as reliable as possible, and then to be able to try to reach conclusions of certainty.

To that end, I asked for the police reports, I asked for all witness interviews, I asked for all reports that had been provided by any doctors who had evaluated Mr. Cheever, I asked for any history about previous criminal behavior or previous behavioral incidents; I asked for any history that was available about his substance abuse or substance dependence, so that I might learn about how effects manifested themselves in Mr. Cheever;

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and asked to review any available information from people that he knew that might shed light, to me, on their observations of him when he was using, when he was not using.

Once I reviewed those materials, then it led me to ask for additional materials that I thought might be present and might be more informative, and those included letters that he wrote in which he was more expressive and were a window of history to help me become more informed, incident reports from custody, because this gave me more of an indication of what his behavior would be like when he was not using a drug, to give me some sense of comparison of whether there was anything different on the drug itself, and while I don't have my report in front of me and I'd love to refer to it, there were a number of other sources that were also inspired by that first pass, including a request for and ultimately I was able to review the neuropsychological testing of Dr. Price and the report of Dr. Evans, although I did interview him first and did not receive those materials until I had already interviewed him.

Q. Now, you had information from law enforcement, but is it also important to get information from lay

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people?

A. Absolutely. Especially insofar as lay people may actually have an opportunity to see something that I haven't seen. If somebody was there at the time and somebody had an experience, it's helpful for me to get their input from their own perspective and to see how consistent that is with where -- with the other information that I have been gathering from other people, and to see how that reflects on what is our understanding of methamphetamine and its effects or other psychiatric conditions and their effects.

Q. Okay. And you did interview the defendant?

A. I did.

Q. And do you recall when?

A. I recalled -- I interviewed him in July 2006.

Q. Okay. How long was that interview?

A. I believe that it was approximately five and a half hours.

Q. Okay. And was it recorded?

A. It was. I asked that the interview be videotaped.

Q. And why?

A. It's -- it's a matter of, in a sensitive matter, I think that it is fair for both sides to have access to my work product, to see that we had a discussion

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that was conducted fairly, to see that it was conducted professionally, to see that the examinee was comfortable, and also to protect him so that if I misconstrue something that he says or I misunderstand, I can go back and check and be careful that I'm remembering things exactly as they happened in an interview.

Q. And when you met with Mr. Cheever to talk to him, did you tell him this was going to happen, the videotaping and everything?

A. I did. And I explained the rationale for it.

Q. Okay. Did you take breaks during this interview process?

A. We took breaks, and Mr. Cheever was instructed at the beginning that if he needed to take a break or if he felt uncomfortable, that we would take a break and also that if he felt that he couldn't continue in the evaluation for any reason, that we would shut it down.

Q. How would you describe him, in terms of clinical symptoms, when you saw him?

A. Well, in the psychiatric interview there's something that we refer to as a mental status exam, because someone's presentation, their behavior, their emotions, their communication, and the clarity of

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their thinking, you can draw not only from your interview experience but also testing that you can do within the interview. And so a mental status exam can, for us, illuminate an understanding of the fine points of the person that you're examining on that day.

I found Mr. Cheever to be composed, quietly self-assured, comfortable about the process, no sign of depression, no sign of sadness, no sign of preoccupation with the event or its consequences or other people affected by it, to be comfortable in his current state of affairs.

He was well-nourished. He was caring for himself. He made good eye contact. He had good stamina for the experience. I mean, these are -- can you imagine sitting down in a five-and-a-half-hour interview under the pressures of -- the rigors of the court case that brings us all together. When I think about it, it may not necessarily be easy but it was something that he tolerated well.

He communicated with a good vocabulary and -- above-average vocabulary, with what we call normal latency. A person who is despondent or who is depressed, you may have long pauses before that

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person responds. A person who is despondent and depressed may make very poor eye contact, maybe -- their eyes may be downcast, but he made good eye contact and was respectful over the course of it.

His thoughts proceeded in a coherent fashion. A person who is psychotic and who has an ongoing psychotic condition may not express themselves in a coherent way. There was nothing in his content of his thought that was irrational. There were no irrational persecutory thoughts. There were no irrational jealous thoughts. There were no irrational what we call referential thoughts. Referential is when this person leans across the table and I think he's leaning across the table because it must have something to do with some agenda that he has that it's against me. So there wasn't any of that misinterpretation of the environment that way.

And cognitively, his memory was capable, his attention was capable, his concentration was capable. And those were some of the observations from the mental status exam.

Q. Did you perform psychological testing?

A. I administered a PAI, which is a Personality Assessment Inventory, and I did so because of all of

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the information that I had acquired to date about what had happened. And I wanted to account for the range of possibilities, both diagnostic, relating to his psychiatric diagnosis, or relating to his personality and his qualities, that I could.

Some of them you can pull in an interview and in questioning. But a PAI, a Personality Assessment

Inventory, can supplement an interview for two reasons: One because of how comprehensive it is. It has quite a number of questions in it that enables someone to answer in a relatively quick fashion. And also because it's not me, because it's a test. And it's like having something sitting on your shoulder, in a way almost like peer review, to say, "Well, you know, this is coming up, have you considered this?" And you might not have considered it. So for that accountability, testing is not a replacement for a psychiatric interview or for history gathering, but it supplements history gathering and it supplements what you're doing in a way that's detached from you and can, therefore, add to it and is, in its own way, objective.

Q. Doctor, could you explain to the jury what you mean "paranoid" is.

A. There are typically three components of paranoia in

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a clinical sense. I'm not talking about in the newspaper sense because it's something that we -- you know, that word gets thrown around a lot. But when you talk to a clinician about what paranoia is, there are really three components: One is persecutory. One is you're a threat to me. You're a threat to me. I perceive that threat, all right.

Two is referential. Two is I see somebody back there in the gallery who turns around and says something and I feel that that person's talking about me. He may be talking about lunch. May have

nothing to do with me. But I think other things refer to me, okay.

And third is jealousy, and usually in some harmful kind of way. All right, that someone is -- has some quality or has some capability that in some way does you wrong. That's the least commonly identified. And when people in a clinical sense talk about paranoid, they will typically talk about the paranoid -- the persecutory quality or the referential quality.

Q. Can you explain to us what a delusion is.

A. If I think you're a threat and Mr. Lind demonstrates to me that you're not a threat and I disabuse myself of this idea, say, "Okay, you're not a threat," and

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move on with it, well, you know, I was suspicious, I might have irrationally interpreted something from you that I had no basis for interpreting, I mean you're sitting there listening, that's paranoid. But it's not fixed. It's a false idea, but it's not fixed.

Given evidence to the contrary, I divest myself of this idea. But if Mr. Lind tells me, "This person means you no harm, this person is just sitting there," and then I come up with some explanation as to why, "No, no, you don't understand, it's the posture, it's the way the person sits," that that's a fixed false idea. In other words, against all evidence to the contrary, a person maintains this idea. So a

fixed false idea is a delusion. A false idea is paranoia if it's persecutory or referential in nature. And that is to be distinguished from suspiciousness, if I'm vigilant and I'm not irrational in my thinking but I'm hypersensitive to my environment and so pick up on cues and will interpret them in a certain way that is more acutely sensitive than others but it's reality-based.

If I say you're a threat, there's absolutely no rational reason for me to experience

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that in the persecutory way, I'm -- but if there were, I'd be suspicious.

Q. Doctor, when -- going back to January 19th, 2005, the date of the murder, when the defendant went to the Coopers', what was his suspiciousness, his level of suspiciousness?

A. In my professional opinion, on January 19th, 2005, when Mr. Cheever went to the Cooper home, he had suspicions about whether his methamphetamine cooking supplies would be taken or whether others that he was dealing with there would in some way -- in some way deceive him or swindle him or take advantage of him, and in particular he expressed suspicions about Matthew Denny and expressed suspicions about Billy Nowell. He had suspicions about the Coopers as well, but he had expressed about Nowell in particular and also Denny.

Q. How did those play out, play themselves out?

A. Well, he gave Matthew Denny a walkie-talkie so that he could keep the area more monitored, and the reason that he wanted it monitored was because he didn't trust the people that he was dealing with. He said that he immediately engaged Billy Nowell because he was under the impression that Billy Nowell didn't like him and was an untrustworthy,

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bad, criminal-type character. And so he engaged him personally, to try to defuse him and to make sure that he had some kind of control over the environment.

Q. And was there any violence out of that suspiciousness?

A. There was no violence.

Q. What was the defendant's response when he was told that the police were corning?

A. Well, his response was, "Well, I hope everyone's happy." And that is in line with concerns that he had that others there had designs on taking advantage of him and taking his methamphetamine cooking stash, as well as the methamphetamine, away.

MR. EVANS: Objection, Your Honor. It's not clear what the source of the doctor's testimony is. Is that what Mr. Cheever told him? I would, I guess, object on the basis of foundation.

THE COURT: Okay, could you clarify the source of information for those observations?

THE WITNESS: Yes, Your Honor.

The input from Ms. Cooper, who passed on the information that the police were corning, said that his response after she told him this, she

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said that he said, "Well, I hope everyone's happy." So this is from Ms. Cooper.

MR. LIND: And she testified here, Your Honor.

BY MR. LIND:

Q. And once he learned this, how did he proceed with these -- with these suspicions that he had?

A. Well, he did not -- his actions did not reflect the change in his course. He continued to be doing whatever business he was doing with Matthew Denny and with the Coopers, he continued to cook there, and Matthew Denny was upstairs with him and he was not antagonistic to him.

And Billy -- as for Billy Nowell, when Billy Nowell left, he, Billy Nowell, left with drugs. And Mr. Cheever was comfortable letting him leave with drugs, notwithstanding his suspicions. So he was not only not antagonistic, but he was -- let alone not antagonistic, he was not threatening, he was not

violent, to any of these characters there, who were really the source of his suspicions at that time.

Q. And why is that significant?

A. Because violence is such a complex phenomenon of what drives a decision to be violent or what drives

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a nondecision to be violent, what are the triggers, what are the customary triggers in an individual.

If I am, as a forensic psychiatrist, exploring the relevance of suspiciousness to his violence, then I have to look at where he was actually most suspicious and to see to what degree that drove or inspired violence. And where his suspiciousness rested on January 19th, 2005, before and after he administered methamphetamine to himself, he did not act menacingly, threateningly or violently on those suspicions.

Q How does that relate to the arrival of the sheriff?

A. Well, he -- he -- before even the sheriff arrived, he, in preparing to leave, he was informed that his car had a flat tire. Now, it would -- it might be suspicious, it might be exceptionally suspicious for a suspicious person to wonder whether someone had intentionally flattened his tire so that he couldn't get out. But his reaction was fix the tire, and gathered his things up. He was not antagonistic to Mr. Denny. He was not antagonistic to Mr. Cooper, who reported that he was fixing the tire. But as he

was packing his things, he was, therefore, delayed in leaving.

There were no suspicions expressed about

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the impending arrival of the police, but Mr. Cheever was gathering his things while he was waiting for the tire to be fixed.

Q. And was this a misperception on his part or --

A. The -- he wondered -- available information that I considered is that he wondered whether the people there had something to do with the police coming. Well, they did if Billy Nowell revealed where he was. And so that -- that's suspicious but certainly not irrational. And he knew that police were looking for him. He knew that he had violated parole. And so there was nothing irrational that was manifesting at that time.

Q. Now, he had used meth before this?

A. He did.

Q. And how does that impact on your opinion or your findings, your thoughts?

A. Well, in my professional experience, individuals who are engaged in illegal activity with other people who are engaged in illegal activity are often suspicious, and for good reason. Vigilance is a developed and cultivated trait, not only about what

you're doing in getting away with it and continuing to get away with it, but also with your confederates and the people that you're hanging out with, to make

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sure that they don't in some way deceive you or take advantage.

So suspiciousness may have nothing to do with a drug, let alone methamphetamine. On the other hand, suspiciousness may also relate to drugs themselves, because they're such a commodity, because they are something to be guarded because everybody wants them. So it's something that not only relates itself to the criminal culture, but also to the drug culture. And then it relates to the drug itself. How does it relate to the methamphetamine? The question is, were there any signs of intoxication? And no information that I received in reviewing demonstrated a change in his behavior from the time that he made his way there, before he used methamphetamine and had not used it for some time, and was acting on suspicions and giving a walkie-talkie to Matthew Denny before any methamphetamine was used and how he was carrying himself inside the house once police were on his way that he was aware. He was packing up his things, and he was waiting for the tire to be fixed when police came sooner than he anticipated.

So how does it relate to methamphetamine? Methamphetamine use, if it intoxicates someone, it

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will cause a change in that person, physiologically, physically, behaviorally, and there were not signs from the history of a remarkable change in Scott Cheever after he used the methamphetamine that morning.

Q. Doctor, are there some good effects of methamphetamine?

A. Depends on the person.

Q. And were there any signs of those in this case?

A. Well, Mr. Cheever talked about how in certain respects, when he used methamphetamine, he functioned with better focus and was more productive for what he was doing. And certainly he had very positive feelings that he described, when he used more and he was chasing what he described as that rush or that orgasmic feeling but certainly it was something left him feeling good, not antagonistic.

Q. Did you assess any long-standing effects of methamphetamine use?

A. I did.

Q And did you look for or try to assess any brain damage?

A. The -- I looked in his history, in his presentation, as well as any available testing, for signs of brain

damage. I should note that methamphetamine use --

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and again it depends on the individual. Some people may use methamphetamine to a substantial degree and demonstrate signs of brain damage, and some people may use it to a substantial degree but are advantaged, for whatever reason that their brain cells are more resilient and they do not show brain damage. So you can never presume brain damage from a particular event or phenomenon; you have to look for it. And the best source of information that we have to yield function, information about brain function, is neuropsychological testing. And so that was why reviewing Dr. Price's testing was helpful to me.

Q. Okay. And you may have said this, but can you explain how you measure, really, the function of the brain with the psychological testing?

A. What neuropsychological testing does is it looks at different particular qualities of your intellectual functioning, all right. It can assess your impulse control. It can assess your higher level of processing. It can assess your memory. It can assess your judgment. It can assess how you regulate emotions. So these are all very refined aspects of our thinking, but what neuropsychological testing affords is the capacity to break that down

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into different subcategories, if you will. In this way we can see if someone is specifically impaired in one area and they may not be impaired in another area, or they may even actually be doing particularly well.

It's -- clinically we don't necessarily look at people in saying that they have a bad brain or that they are brain damaged globally. It may be. But what we do is we look at particular functions and qualities that they have and say impaired in which way, and that's what neuropsychological testing allows, is it allows us to look at all kinds of different responsibilities that the brain has, and to see how is the brain's capability measuring up in X responsibility, in Y responsibility, in Z responsibility, in A, and B, so that if we find damage, we know how to localize it and be specific about it.

Q. And what in particular showed up on Mr. Cheever's psychological testing?

A. Well, I would -- I would appreciate actually being able to reference Dr. Price's report, which I thought was -- covered a variety of different areas.

I will say --

Q. If you can hang on just a minute, Doctor, I can

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provide you that.

(Whereupon, a sotto voce discussion was had between Mr. Lind and Mr. Evans.)

BY MR. LIND:

Q. Doctor, let me show you what has been marked as State's Exhibit 168.

A. Thank you.

Q. And is that the report of the neuropsychological testing done by Dr. Price?

A. This is the report I reviewed, yes.

Q. Would that refresh your recollection of the results that showed up on that test?

A. It does.

(Brief pause.)

A. The -- Dr. Price laid out some findings and conclusions, but also noted, relevant to what I was asked to look at, certain qualities, in addition his report, that were important to me as it relates to Scott Cheever. But in his conclusions what he found was that Mr. Cheever had a high overall general intelligence, both on verbal qualities and on nonverbal qualities. And within that, found that he had above average attention and concentration, that

he had superior memory, that he had above average motor skills (indicating), and high average

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executive functioning. And executive functioning is the quality of thinking that we associate with making those kinds of sensitive decisions.

Within that look at executive functioning, Dr. Price found that Mr. Cheever had high average what is known as response inhibition, response inhibition. The reason that that is significant is that it is testing that looks at complex tasks of thinking and processing and also inhibiting response. And when I think about the decisions and processing that he was making all through that day, I'm suspicious of these people, I'm armed, this person is hostile to me, I'm giving him drugs without threat, I'm suspicious of this person, he is unarmed, I am armed, I don't threaten him, I'm not intimidating him, I'm talking about Matthew Denny. I hear police. I recognize the voice of this person as someone that I have had positive experiences with. I make a decision not to shoot, but to be silent, with the hope that this person goes away. The person comes near me but turns, and I'm aware of his movements, and still I am quiet and I don't shoot and I don't move. And I don't jump out the window the way my confederate later does. And when I do shoot, I don't shoot before Matthew Samuels

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walks through the curtain in such a way that I might scare him, the way my later shots frightened the deputies that came to pull him away, but I shoot him at a point in which he is very much within my range, has passed through that curtain, and I know that he is coming upstairs, and that is when I shoot. And then I stop shooting when someone says stop shooting. And then I continue not to shoot the entire day, not until I know that a SWAT team is making its way up and then I fire shots, and as soon as my bullets expire, I throw my hands up and say I surrender. And so this is a whole range of executive decision-making that reflects go, no go, act, don't act. And so it is -- his history is consistent with what was found in Dr. Price's testing of, certainly, unimpaired, but what Dr. Price found was that he had high-average response inhibition to his cognitive functioning.

Q. Doctor, in your evaluation what conditions were you looking for?

A. Scott Cheever knew that the police were there to take him into custody. He did not want to go into custody. And he made a choice to shoot. And then he made a choice to extend a stand-off and then to continue shooting and to not shoot when he did.

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And so because these are the questions that have been brought to my attention and because methamphetamine was raised to say, okay, well,

this -- there is some suspiciousness here and here's a person who made a choice, which has now brought him trouble, is that something that only happens to people who use methamphetamine or does it happen in other circumstances, and under which circumstances, okay. A person may have a psychiatric condition which may, in some way, explain those kinds of choices. I looked at depression. There was a history after he was in custody of his having a depressed mood and his being treated with an antidepressant and responding. So I looked at the possibility and the presence of depression and whether that might have explained it.

I looked at the possibility of the influence of alcohol, because while he had not been violent, and this is -- this -- while he had not been violent on methamphetamine in his previous identified incident of violence that led to an arrest, he reported that he had been drinking alcohol. So it was important for me to consider the possibility of some alcohol-related condition as well.

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Q. You're talking about the robbery that he was arrested for?

A. That's right.

Q. Okay.

A. I considered the possibility of a dissociative condition because of his -- because of the points that

the previous witness mentioned of, you know, awareness or consciousness. Well, what kinds of conditions are there in which you lose awareness or, you know, you don't know where you are, you don't know who you are? A dissociative condition would explain that. And I considered that and looked into it, and it was part of the information that I gleaned and I had gathered.

And looked at personality conditions, personality disorders, because personality disorders are conditions but they're conditions not so much -- the difference between a condition and a personality disorder is that if you develop, for example, panic disorder, you don't want panic attacks, you seek help for panic attacks. That's a condition. What a personality disorder is is that everybody else doesn't want you to be that way, but you want to be that way because it suits you. And it's not just what was mentioned earlier, antisocial. People can

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have dependent personality. Nobody wants 'em to be dependent, but they want to be dependent because it suits them and they are comfortable with it.

So in looking at all of the different possibilities one considers those diagnoses as well. And, lastly, just environment phenomena. Who did he want to be? What was the script of his life as he was laying it out at that time? And I had to consider that in the context of the efforts that he made to make sure he would not go back into custody.

Q. And in that vein did you -- did he talk to you during your interview about his fascination with outlaws?

A. We talked about the people who were important to me, and what -- what I came to learn in my interview is that Scott Cheever was one of these unusual people who's actually exposed to a variety of different people in his life. He had people who were criminal types. He had people who were not criminal types but who were drug users. He had people who were clean and straight and were athletes. He had people who were not athletes and clean and straight but elders and were responsible people. And because he was, other people perceive different things. According to him his grandmother perceived him to be

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bright. Other people perceived him to be an extremely talented athlete, and he was, and responded to him as people naturally do to a very talented athlete. And other people found him mannerly, because he was able to be polite with others. So what I found in the interview was that, from him, was that he found himself identifying with and looking up to people that he alternatively described as bad boys or outlaws, and looking up to them and being impressed and awed by them, and in certain instances wanting to outdo them.

Q. Doctor, as part of your interview, did you discuss with Mr. Cheever the consequences of his use of methamphetamine and its effects on him?

A. I did.

Q. And what did he tell you were the consequences of his use of methamphetamine?

A. Well, in his -- in his reflection, the greatest consequences of his methamphetamine use was that he alienated other people in his life because he was so absorbed in all of the activities of getting the materials, cooking the drug, using it, and just continuing in that life. And because it was such a priority for him, he ignored and was inconsiderate to other people and that was his greatest regret

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about methamphetamine influence on him.

Q. It wasn't violence?

A. He did not mention violence and he did not mention suspiciousness. He mentioned that he was essentially inconsiderate and not respectful of people that he would have otherwise liked and cared about and alienated those relationships.

Q. Doctor, what did you ultimately conclude with respect to the role of methamphetamine in this case with Scott Cheever?

A. With respect to methamphetamine, what I came to learn was that Scott Cheever had used many -- had used methamphetamine on a number of occasions time and again, injected, injected, injected, continuous injections or what would have been

described what you probably heard as "runs," and on those instances did not become homicidally violent, and he became violent in the aftermath of methamphetamine use of a far smaller scale.

I would also note that, given what we understand is tolerance, tolerance says that if we go out to a bar and I have three beers, four beers, on this day, I will fall under the table and if I keep drinking those four beers for the next two years you and I will go out in two years and I will

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not fall under the table, it will take more to affect me. And so it goes with different kinds of drugs, that over time if you use more and more, you're not going to be affected to the same degree that you have been at an earlier stage of your drug use, and that tolerance was something that Mr. Cheever appreciated in himself, and so not only were we dealing with a situation where Mr. Cheever, on that day, at that time, when he killed Matthew Samuels, that he used far less, but he was using far less as a person with a tolerance for methamphetamine.

Q. And with that, do you believe that the methamphetamine had an influence or had an impact on his ability to perceive and make decisions and control his actions?

A. I need to actually break that down, perhaps start with perception.

Q. All right.

A. And then the decision and the control, handle them separately.

His perceptions were acute enough that he talked about hearing the gravel when the police car drove up. His perceptions were enough that he could discern that it was Matthew Samuels who came. His

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perceptions were acute enough that he heard the dialogue downstairs and he made it out, not just people talking but what was being said. He was aware of where Matthew Samuels was in relation to him, was aware of him approaching the curtain, so he was aware of what he saw, what he couldn't see, aware of what he heard.

He was aware of his surroundings. He was aware of a window nearby. He was aware of Matthew Denny being there with him and was in a position to play off that both should make sure that the other should keep quiet. He was aware of the fragility of the structure that he wondered about what would happen if either of them would go out the window and go onto the roof, whether the roof could withstand weight of a person.

He was aware, heard, of Matthew Samuels leaving, going, and knowing that Matthew Samuels was going to come back. And when Matthew Samuels was coming up the stairs, he was aware that he was coming up the stairs. He was also considering, this is venturing into decision-making

area, that the curtain, an access to that upper area, was relatively recent and was aware that a number of people might, theoretically, not even notice the

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curtain to go behind and to go up.

So his perceptions of what he saw were unimpaired by all of the information available to me, and even beyond that, what he heared (sic) and of his surroundings were intact, and then he shot, and his awareness was such that even though he engaged Matthew Denny after he shot, he was aware enough that he went back to Matthew Samuels to shoot him again.

So he didn't get diverted and lose track of the surroundings, but went right back and reengaged with a person he had shot and shot him again, and the shots were accurate, which is also an awareness. Not firing wildly, but firing not only shots that hit but lethal shots.

And then after the deputy came in and was removing the sheriff, even before he did, he continued to shoot, and he was aware that there were other police in the area. The information of Deputy Mullins was that he experienced a bullet whizzing by his head, and so that's an accurate shot. And that's a person shooting at a blind target and being accurate enough that a person feels a bullet whizzing by. He was -- his perceptions were acute enough that he only needed to be told once to stop

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shooting and he stopped shooting. And he stopped shooting under the circumstances of an explanation from Mr. Mullins that he was taking Matthew Samuels out.

And this is especially important in light of this whole question of suspiciousness. If he had irrational fears about some sort of threat, it would have been insufficient to merely say "stop shooting," especially because an emotional Deputy Mullins was screaming and cursing downstairs when he saw that Matthew Samuels had been shot, that in spite of the emotional pitch that was now part of the scene, he stopped on a dime, and so his awareness of his surroundings, by all of the information that's available to me, was either intact or even heightened.

Q. Let's talk about his decision-making ability.

A. The decision-making ability, as I've -- as I've assessed it in this case, began with his -- his decision-making once it became clear that the police were there. He made a decision not to try to flee, not to try to run. He made a decision to keep himself where he kept himself, as opposed to another part of the house. He made a decision to stay quiet lest any kind of disturbance aroused suspicion from

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Matthew Samuels downstairs. He made a decision to hold his fire when he did, even though he was

armed. He made a decision to hold his fire even after Matthew Samuels approached the first time. And he made a decision to hold his fire even though he knew Matthew Samuels was outside and preparing to come back, that he did not shoot out the window or do anything of a provocative and intimidating way to say, "Stay away, because I will shoot." And he made a decision to shoot when he did.

And then he engaged Matthew Denny and then went back and made a decision to shoot again. And then when he stopped shooting he made a decision to stop shooting. And when he held his fire, he made a decision to hold his fire. And at junctures over the course of the day, when the SWAT team tried to engage him, and in his communications with them, how he handled that, he was not belligerent, he was not provocative. He asked for more minutes. And so this is how he was handling the stress of the moment.

He was quiet and only acted once they came upstairs, but not before he told them, "Don't come up." And so, again, did he say "Don't come up" to Matthew Samuels earlier? No. But when there were

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many people downstairs and they were all about to rush up and with tear gas, he made that decision, not to shoot, but to say, "Don't come up." And then after they came up, that was when he began to shoot. And I might add, referencing the perception issue, to shoot accurately, to hit body shields where

the body shields actually were present, and made a decision, when he ran out of ammunition, to immediately surrender, not run for the window, not to jump on someone, but to -- but to surrender and then to, as he put it, to play possum, which is a -- which is a position of complete harmlessness. Not only not to shoot, but to carry himself in a way in which he would convey the greatest sense of harmlessness to people who had just been shot at and who are heavily armed.

Q. And all these things also you talked about demonstrate his ability to control his actions along all these?

A. That's correct.

MR. LIND: Your Honor, this may be a good place to break for lunch. I don't anticipate it will take too much longer afterwards but it is noon.

THE COURT: All right, I agree.

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Ladies and gentlemen of the jury, we'll take the lunch recess. Just remember the admonition not to discuss the case among yourselves, don't let anyone discuss it with you, don't form or express any opinions about the case. You're still hearing the evidence.

Have a pleasant lunch and we'll pick it up at 1:15. Thank you.

MR. EVANS: Your Honor, can we take just a slightly longer break today?

THE COURT: Yeah.

MR. EVANS: I think we're close to being done with the case.

THE COURT: How much longer?

MR. EVANS: About 15 minutes.

THE COURT: All right. Let's make it 1:30.

MR. EVANS: Thank you, Judge.

(A recess was taken from 12:00 o'clock to 1:33 p.m.)

THE COURT: Please be seated. Thank you, ladies and gentlemen.

(Witness resumes witness stand.)

THE COURT: All right. The record will reflect the presence of the jury, counsel and the defendant.

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And, Mr. Lind, you may continue.

MR. LIND: Thank you, Your Honor.

MR. LIND:

Q. Dr. Welner, you spent about how many hours on this particular case?

A. Approximately 200 hours.

Q. Two hundred hours, that would include three trips out here on this case?

A. This is my third trip.

Q. And 200 hours, is that a 40-hour week, that would be about five weeks of your time?

A. That's assuming I work a 40-hour week, but it never seems to turn out that way, but . . .

Q. Is that common in a case of this magnitude?

A. There is a range. You know, there are some cases in which one might spend a hundred hours, and on a case of this magnitude I've spent as many as 600 hours on a case, so it really depends on the nature of the questions that are being posed to me and the questions of this case were very specific and focused and that's the time that I needed to address and review these sources.

Q. So in this case you received approximately $80,000?

A. In billing, correct.

Q. In billing, yes. And we've all seen a bill after

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surgery things. Is this typical of what an expert of your qualifications to get in a case of this magnitude?

A. I was just thinking that I don't perform surgery, but be that as it may, it is customary for a person in this field, with this number of hours, that's pretty much a standard, in terms of billing hourly and the amount of time put in, yes.

Q. Now, Dr. Welner, have you formed an opinion as to whether the defendant, after injecting methamphetamine on January 19th, 2005, had the ability to think the matter over before acting on the matter?

A. I do have that opinion.

Q. And does he have that ability?

A. In my professional ability, he did.

Q. He did. And have you formed an opinion as to whether the defendant, again after injecting methamphetamine on January 19th, 2005, had the ability to form the intent to kill before the act?

A. I do have an opinion.

Q. Did he have that ability?

A. In my professional opinion, he had that ability.

MR. LIND: Thank you, sir.

I've no further questions I'll pass the

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witness.

THE COURT: Mr. Evans.

MR. EVANS: Yes, sir, thank you, Judge.

CROSS-EXAMINATION

BY MR. EVANS:

Q. Dr. Welner, I think I've seen you on television. You've appeared on television before; is that right?

A. I have.

Q. Some of the nationally televised shows?

A. I'm a consultant to ABC News.

Q. You testify frequently; is that accurate?

A. No.

Q. How many times have you testified?

A. This is the first time I'm testifying this year. I've testified over the course of my career probably between 75 to a hundred times, but in recent years I probably testified -- this year this is my first

testimony, but last year I think I testified three or four times.

Q. You're testifying it's your -- you've said that you've spent 200 hours on this case; is that right?

A. Approximately, yes.

Q. And at 4750 an hour -- 400 an hour, excuse me, 400 an hour, so you're right at $80,000?

A. Approximately, yes.

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Q. You have a web site, forensicpanel.com; is that right?

A. That's the web site of the panel, yes.

Q. That's to alert people that you're available for hire, in part; is that right?

A. It's a web site to explain what we do, and certainly we can be contacted through that web site if that's how people seek us out, sure.

Q. And it tells people how to contact you via that web site, right?

A. It does.

Q. And it tells the potential market for your services something about what you provide; is that right?

A. It explains what cases are within our expertise, so people have an idea of what areas we have expertise in and what areas we don't have expertise in.

Q. And you have a peer review board; is that right?

A. Don't have a peer review board. The peer review is conducted by people who are either members of The Forensic Panel, and that's specifically people that we've had experience with, that we have a lot of confidence in, that we've vetted, essentially, and we've offered membership in The Forensic Panel and occasionally people who are not in The Forensic Panel but we feel they have exceptional expertise

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that lends itself to a particular case. And they're specifically and individually offered the opportunity to peer review on a particular case but they can turn that down if they wish.

Q. And your web site directs people how they might become part of your peer review process; is that right?

A. Gives people instructions about how to apply for membership, correct.

Q. Now, you peer reviewed this case?

A. Peer review was done in this case, that's correct.

Q. You flew out and, excuse me, you saw Scott at the prison there just outside of Leavenworth on July the 12th of 2006?

A. Yes, sir.

Q. Right? And you spent from 8:00 until 6:00 talking to him off and on on that day; is that right?

A. Yes, sir.

Q. And a 231-page transcript was generated from that conversation that you had with Scott on July the 12th of 2006; is that correct?

A. I'm aware of the transcript. I didn't know it was 231 pages, but I'll accept that as is.

MR. EVANS: If I can approach the witness, Judge.

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THE COURT: Yes, you may.

THE WITNESS: Thank you.

BY MR. EVANS:

Q. Look at that, make sure I've got the right transcript, and it gets to about 230, 231 before you stop talking to him.

A. (The witness complies.) This looks like my interview, yes.

Q. You ask him dozens of questions that day; is that accurate?

A. Yes, sir.

Q. He answered all of your questions, didn't he?

A. I think so.

Q. Didn't refuse to answer any of them, did he?

A. I don't think so.

Q. It appeared to you, based on all the documentation you looked at, that he answered those questions truthfully?

A. I don't think that I would go that far. I think that he -- in my opinion, he was cooperative. I believe he answered the questions. As I recall, he did not refuse to answer any question. There may have been some questions which did not jibe with what I understood to be factual, but I -- that's as far as I can interpret that.

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Q. You know, I did not realize that this was being streamed on the Internet. Did you watch the Internet testimony when Scott testified here in front of this jury on Friday?

A. I did not watch that testimony.

Q. So you're not in a position to say whether anything he said was inaccurate Friday, are you?

A. I'm in a position to say that because I've reviewed the transcript.

Q. Okay. When you talked to him on July the 12th of 2006, a report was generated by you, I think, July the 27th of 2006; is that right?

A. Yes, sir.

Q. This was a multi-page report, correct?

A. Two reports, but, yes, there -- the July 27th report is 30 pages.

Q. That was -- that report was peer reviewed?

A. Yes, sir.

Q. Did these folks just read the report or did they also look at the underlying documentation?

A. Here's how the peer review in this case took place. And I need to distinguish it because there were certain aspects of the peer review that were particular to this case that may not necessarily be done in other cases. I reviewed a number of sources

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of information, and then I presented the case to two peer reviewers, one a forensic psychologist named Lewis Schlesinger, the other a medical toxicologist

named Jack Snyder. And in our discussion we focused on the questions that I was attempting to resolve, the different possibilities that I needed to consider, and that anticipation in preparation of my interview what did I want to get into.

Prior to completing my findings, sometime later, I again engaged Dr. Schlesinger and Dr. Schneider. Dr. Schlesinger was additionally involved in the case in such a way that he was given the PAI to review and to offer me his professional impressions of it, because in my professional opinion he has more experience in reviewing psychological testing and I wanted to involve his judgment in a more direct way.

In order to enhance the fidelity, the strength of Dr. Schlesinger's conclusions, I had him identify peer reviewers of his choosing that I did not have any previous connection with, and he involved Drs. Reed Malloy and Dr. David Shapiro as peer reviewers to his interpretation of that psychological testing, and then once that continue was -- came together, provided me those findings,

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which I included and incorporated in my own findings from all of the other information that I had assembled.

Q. That was going on in that 15 -- 15-day period between the 12th and the 27th?

A. Absolutely, sure.

Q. Okay. Let me ask you this --

A. It had to have because that's when the test was generated, the PAI.

Q. Let me ask you this. The people that do the peer review, are they compensated?

A. Sure, absolutely, they're professionals and their time is valuable.

Q. Are they compensated at your rate?

A. They're compensated at an agreed-upon rate, and I'm not compensated at a rate. The panel was compensated for my time, and they are independent contractors who are compensated for their time.

Q. So these peer reviewers have been paid, as well as you; is that right?

A. Yes.

Q. How much?

A. Peer reviewers in this case were paid 225 to $250 an hour.

Q. So when you sit down and talk to the peer reviewers,

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a bill is being generated that's $650 an hour?

A. Absolutely. Sure. There are three professionals involved. If they're -- if we're talking simultaneously, there are three professionals involved who are -- who are providing time and effort to the case.

Q. So the eighty grand that has been generated as to you doesn't include the peer reviewers?

A. No, I believe it does include the totality of the work done on the case, including the peer reviewers.

Q. Who is the bill presented to?

A. The billing authority. The billing authority in this case has changed, and so when the billing authority was the former person responsible, we provided them with a bill. And then for anything done after the fact, then a newer agency gets the bill.

Q. First you bill the U.S. Attorney's office?

A. That's correct.

Q. And then -- now you're billing the Attorney General of the State of Kansas?

A. That's correct.

Q. Now, there was a toxicologist involved in this, in your peer review; is that correct?

A. Medical toxicologist, that's correct.

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Q. But there was no blood or urine to test; is that correct?

A. That's correct.

Q. You heard Dr. Evans testify today, right? You sat in the back and listened to his testimony?

A. Yes, sir.

Q. He talked about the effects of meth versus the effects of alcohol, much different. Did you hear that?

A. I did.

Q. Do you agree?

A. He offered a number of opinions and I prefer to really focus on each of his opinions, because there's some opinions that I agree with and there are some opinions that I don't agree with.

Q. See, I'm asking you about that alcohol/meth opinion. Do you agree with that?

A. I think he offered a number of opinions in that regard, and I'd really appreciate it if you could focus me on a specific point that he raised.

Q. Specifically he was asked about the effects of alcohol, the blackouts, the not remembering, and asked to contrast that with methamphetamine intoxication.

A. Of whether people blackout on methamphetamine, and

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he contrasted it with alcohol. Yes, I would agree with that.

Q. You don't contest that Scott used methamphetamine on January the 19th, the day of this homicide, do you?

A. No, I do not.

Q. You don't contest that he was methamphetamine dependent at this time in his life, do you?

A. Yes, I agree with that. (Nods head.)

Q. You agree that he was meth dependent?

A. I agree that he met criteria for a diagnoses of methamphetamine dependence.

Q. Do you agree that the meth on January 19 was affecting him in some way?

A. I think it's quite possible that he was affected by the methamphetamine that day.

Q. Do you agree that the meth that he had done prior to January 19th could still be affecting him on January the 19th of 2005 in some way?

A. No. I think that the -- looking specific -- if -- looking specifically at the event that's brought us here, the answer is no. If I would say, in an indirect way, Well, if he was -- if he was not methamphetamine dependent, would he have gone to cook methamphetamine? Well, of course not. So focusing on the event itself of these charges, I

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have to say no, even though I acknowledge that he's methamphetamine dependent, that if there is any influence of methamphetamine, that it would have been the methamphetamine that he did that morning.

Q. You're not telling the jury that he was making good decisions on January 19th of 2005, are you?

A. No. But I am telling the jury that he was making decisions in keeping with priorities that he had established for himself. They are decisions that we might not necessarily agree with, and they're decisions that we would certainly not recommend that others take, but they are decisions that he charted out in -- consistent with other decisions that he was making and the path that he had placed and maintained himself on.

Q. You're not saying the meth didn't affect those decisions, are you?

A. I don't think that the methamphetamine affected his decision to be an outlaw and to identify with outlaws and to make decisions as outlaws do. I

think that it is possible, possible, that methamphetamine made him more aggressive. But it was making a person aggressive who was armed to begin with and who identified not only with outlaws but outlaws who were engaged in fatal shootouts with

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police officers. And so that's a very -- it's a very hued area, because one of the most striking things about Scott Cheever from that morning is that the choices that he was making and the efforts that he was making to avoid capture were pathways that he was embarking on sober as well as under the influence of methamphetamine. And I can't separate that in answering your question.

Q. Did shooting the sheriff help him avoid capture? Didn't it guarantee that he'd be sitting right where he's sitting right now?

A. I need to answer your first question.

Q. Okay.

A. I just need a moment to really think about it. I mean, quite obviously, as we reflect on it, no. But I'm -- I'm pondering what his expectations were. You know, I would agree with Dr. Evans about one point, just -- I wouldn't confine this to people who are methamphetamine users. You know, in my experience of interviewing many, many people who do things that they later come to appreciate that

they're in a whole lot of trouble for, they just don't think --

MR. EVANS: Objection, Your Honor. I don't think this is responsive.

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THE COURT: I don't either. I'll sustain the objection.

BY MR. EVANS:

Q. Let me ask the question. I'll try to ask one question at a time, I promise.

A. All right.

Q. I'll try. Do you think him shooting the sheriff, killing the sheriff, that was not a good decision, was it?

A. Absolutely not.

Q. If his idea was to leave, to get away from the scene, that did not help him get away from the scene, did it?

A. It helped him from being apprehended. And he was thinking, as I was saying a moment ago, he was thinking in the moment, which is not uncommon in many people who carry out ill-advised crime.

Q. Not uncommon for meth users either, is it?

A. Meth users and other people who are not under the influence, but people who act in the moment, think in the moment, and live in such a way that reflects their indifference to the consequences of their actions and indifference to the predicament because they're ready for come what may.

And in keeping with that, I did think that

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it was clinically notable for him to write to an associate that he'd do it again in a heartbeat, and he wrote that sober.

MR. EVANS: Nothing further.

MR. LIND: No redirect.

THE COURT: Thank you, Dr. Welner. And you may step down.

(Witness excused from the witness stand.)

THE COURT: Mr. Evans, anything else? Or I'm sorry, wrong side.

MR. DISNEY: Your Honor.

THE COURT: Mr. Disney, anything else?

MR. DISNEY: No, Your Honor. The State would rest its rebuttal case.

THE COURT: All right. Will there be any surrebuttal evidence?

MR. EVANS: No, sir.

THE COURT: All right. Ladies and gentlemen, the evidentiary portion of this trial has come to an end. Both sides have presented all of the evidence that they wish to present. The next phase of the trial will be for the Court to give you the instructions and then for you to deliberate as to whether or not the defendant is guilty or not guilty of the crimes charged against

* * *

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
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MAY 13 2013
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No. 12-609

In the Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

SCOTT D. CHEEVER,

Respondent.

On Writ of Certiorari to the Supreme Court of Kansas

PETITIONER'S BRIEF ON THE MERITS

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The opinion of the Kansas Supreme Court is reported at *State v. Cheever*, 284 P.3d 1007 (Kan. 2012), and is reproduced in the Petition for a Writ of Certiorari as Appendix A.

JURISDICTION

The Kansas Supreme Court decided this case August 24, 2012. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The **Fifth Amendment** to the United States Constitution provides, in pertinent part, "No person ... shall be compelled in any criminal case to be a witness against himself ...." U.S. Const. amend. V.

The **Fourteenth Amendment** to the United States Constitution provides, in pertinent part, "... nor shall any State deprive any person of life, liberty, or property without due process of law ...." U.S. Const. amend. XIV.

The relevant Kansas statutes and relevant sections of Federal Rule of Criminal Procedure 12.2 are set forth in full in the Petition for a Writ of Certiorari at pages 2-5.

STATEMENT OF THE CASE

1. ***The Murder of Sheriff Samuels.*** On January 19, 2005, Greenwood County Sheriff Matt Samuels, accompanied by two deputies, went to the Cooper home in a rural part of Greenwood County, Kansas, known as "Hilltop" (and known for illegal drug activity) to execute a warrant for Scott Cheever's arrest. Cheever was at the Cooper home that day cooking methamphetamine. As the law enforcement officers were approaching the property, the Coopers informed Cheever that the police were coming and were outside the house. Cheever then hid with a companion in an upstairs room where he had been making methamphetamine. Cheever was armed with a pair of handguns he had stolen from his stepfather, including a .44 caliber weapon.

When Sheriff Samuels went to the door of the Cooper house, Darrell Cooper lied and told the Sheriff that Cheever was not there. (Pet. App. 108.) The Sheriff asked if he could look around the house anyway. Cooper consented, and the Sheriff entered the house. Cheever heard the Sheriff ask "Where does this lead?" apparently referring to the stairs. (Pet. App. 108). Sheriff Samuels started up the stairs. Cheever testified "[t]hat's when I look out the door and he's [Sheriff Samuels] like right there, and I pull the trigger and shoot him and then as soon as I do that I jump back in the room ...." (Pet. App. 110.) At that point, Cheever had shot Sheriff Samuels once in the chest at close range (about 10 feet) with a .44 caliber revolver.

After Cheever retreated into the bedroom, he told his companion "Don't go out the window. They'll shoot

you." (Pet. App. 110.) Then, according to Cheever, "I turn around and look and I don't see Matt [Samuels] anywhere, and I walk over by the railing and I look down and I see him again, and I pull the trigger again and shoot him." (Pet. App. 110.) Cheever testified that "[t]hen I jump back and go back into the room." (Pet. App. 110.) Cheever admitted that he knew he was shooting Sheriff Samuels when he fired both shots, including the first shot. (Pet. App. 110-111.)

Sheriff Samuels lay mortally wounded at the foot of the stairs when Deputy Sheriff Michael Mullins attempted to provide first-aid, but Cheever then shot at Deputy Mullins. Cheever abated fire after Mullins yelled at Cheever to stop so that the deputies could get the Sheriff out of the house. Mullins started CPR on the Sheriff while another deputy, Tom Harm, radioed for help. Sheriff Samuels was taken to a hospital, but his wounds – caused by two .44 caliber shots to the chest at close range, a distance of at most 10 feet – were fatal.

After the shooting, state and local law enforcement officers surrounded the Cooper house. After roughly seven hours, a Kansas Highway Patrol (KHP) special response team entered the house and rushed the stairs through a hail of gunfire from Cheever. Cheever shot one KHP officer who was wearing a bulletproof vest, but ran out of ammunition for the .44 caliber weapon. When the response team cleared the top of the stairs and began returning fire, Cheever finally stopped shooting and surrendered.

2. *The Criminal Prosecutions of Cheever.* Cheever was charged in state court with capital murder for the killing of Sheriff Samuels, with attempted capital murder for shooting at Deputies Mullins and Harm, and with attempted capital murder for shooting at the KHP response team officers who took him into custody. Cheever also was charged with manufacturing methamphetamine, conspiracy to manufacture methamphetamine, and criminal possession of a firearm.

However, because the Kansas Supreme Court recently had held Kansas' death penalty statute unconstitutional, *see State v. Marsh*, 278 Kan. 520, 102 P.3d 445 (2004), *reversed*, *Kansas v. Marsh*, 548 U.S. 163 (2006), and that decision was still under review by this Court, the State asked federal authorities to prosecute Cheever under the Federal Death Penalty Act. Cheever then was indicted on thirteen federal counts, including capital murder. USDC Case No. 05-10050-01-MLB; *see also United States v. Cheever*, 423 F.Supp.2d 1181 (D. Kan. 2006).

In the federal case, Cheever filed notice, pursuant to Federal Rule of Criminal Procedure 12.2(b), that he intended "to introduce expert evidence relating to his intoxication by methamphetamine at the time of the events on January 19, 2005, which negated his ability to form specific intent, *e.g.*, malice aforethought, premeditation and deliberation." (USDC Case No. 05-10050-01-MLB, Doc. 205). (Pet. App. 69-70.) Pursuant to Rule 12.2(c), the district court ordered a psychiatric evaluation of Cheever by Dr. Michael Welner, a forensic psychiatrist and clinical pyschopharmacologist, to assess (1) "the relationship of methamphetamine

and Scott Cheever's use of it on January 19th, 2005, to his killing Matthew Samuels," (2) the effects of Cheever's ongoing methamphetamine use, and (3) "to what degree that ongoing use over all of that time related to his behaviors in killing Matthew Samuels." (J.A. 111.)

In September, 2006, the case proceeded to jury trial. However, several days into the trial, Cheever's defense counsel became unable to continue, resulting in a halt of the proceedings. In the meantime, this Court reversed the Kansas Supreme Court in *Kansas v. Marsh* and held that the Kansas death penalty statute is constitutional. The federal case was then dismissed without prejudice, and Kansas recommenced the state prosecution.

a. ***The State's Case Against Cheever.*** At trial, the State presented the testimony of the various law enforcement officers involved in the events of January 19, 2005. Cheever himself testified in his own defense and admitted that he shot and killed Sheriff Samuels. Cheever testified that he shot the Sheriff once at close range, retreated into the room in which Cheever had been hiding, spoke to his companion, and then stepped out and shot a helpless and gravely wounded Sheriff Samuels at close range a second time, knowing the entire time that it was Sheriff Samuels he was shooting. (Pet. App. 108-111.) Cheever also admitted shooting at Deputies Mullins and Harm when they tried to rescue Sheriff Samuels, and he admitted shooting at the KHP Troopers when they entered the house.

Cheever also admitted to manufacturing methamphetamine, that he previously had pled guilty to robbing a grocery store and assaulting a clerk, and that at the time he shot Sheriff Samuels he (Cheever) was a felon in unlawful possession of a firearm (multiple stolen firearms actually).

b. ***Cheever's Defense.*** Cheever's defense was that both his long-term and short-term use of methamphetamines affected his ability to use rational judgment and to form intent. Relying on both his own testimony and the expert testimony of Dr. R. Lee Evans, a psychiatric pharmacist, Cheever argued that he was incapable of forming the necessary intent for the capital murder charge, *i.e.*, he lacked the mental ability to "premeditate" the murder he committed on January 19, 2005.

c. ***Expert Testimony – Cheever's Expert.*** In support of his mental-status defense, Cheever offered the testimony of Dr. Evans. Dr. Evans identified himself as a "psychiatric pharmacy specialist." (J.A. 32.) He explained that his work involved "questions about how drugs affect people." (J.A. 33-34.) Like the State's expert, he conducted an in-person interview and examination of Cheever. (J.A. 35.)

Dr. Evans described the effects of methamphetamine on the brain. He testified that, over time, such drug abuse inhibits brain functions, including decision-making, and causes side effects such as paranoia and violence. Dr. Evans further testified that, on the day of the murder, Cheever was under the intoxicating effects of methamphetamine and was incapable of rational thought. He opined that Cheever's

shooting of Sheriff Samuels was a drug-induced reaction to a perceived threat, and not the result of any thought process. Dr. Evans also discussed paranoid psychosis, drug-induced psychosis, and drug-induced paranoia, (J.A. 43-44.), and he opined that Cheever showed "symptoms of psychosis." (J.A. 47.) Dr. Evans' opinion was that Cheever's use of methamphetamine affected Cheever's ability to premeditate the capital crimes. (J.A. 40-44, 46-52.)

d. ***Expert Testimony – The State's Rebuttal.*** In rebuttal, the State called Dr. Welner, the psychiatrist who evaluated Cheever in the federal case after Cheever filed a notice under Fed. R. Crim. P. 12.2 of his intent to rely on the same defense in that proceeding.

Dr. Welner is a forensic psychiatrist and "board certified in ... clinical psychopharmacology." (J.A. 95.) He explained that psychopharmacology "relates to medications and drugs, and other kinds of physical treatments and their relationship to psychiatric illness." (J.A. 95-96.) He has worked on cases involving methamphetamine and treated patients who used methamphetamine. (J.A. 109.) For this case, he reviewed the police reports, witness interviews, medical reports, and historical evidence regarding Cheever's past behavior and substance abuse. (J.A. 112-13.) In conducting the federal court-ordered examination of Cheever, he interviewed Cheever for several hours, read materials that Cheever had written, and reviewed Cheever's prior neuropsychological testing. For the state trial, he also reviewed Dr. Evans' report on Cheever. (J.A. 113-14.)

As did Dr. Evans, Dr. Welner discussed paranoia and its symptoms. (J.A. 118-19.) Dr. Welner concluded that no information he received or reviewed "demonstrated a change in [Cheever's] behavior" from the time that he [Cheever] went to the Cooper residence, before he used methamphetamine, or after Cheever injected himself the morning of the murder: "there were not signs from the history of a remarkable change in [Cheever] after he used the methamphetamine that morning." (J.A. 124-26.)

Dr. Welner explained that in evaluating the relationship between methamphetamine and Cheever's behavior on January 19, 2005, he considered a variety of other possible influences such as alcohol use, personality conditions, mental disorders, and environmental phenomena. (J.A. 131-33.) He also discussed with Cheever the effects methamphetamine had on Cheever. (J.A. 134-35.)

Dr. Welner explained that Cheever's perceptions and awareness of his surroundings on January 19, 2005, were unimpaired, pointing out that Cheever engaged in a series of decisions once the police arrived, decisions that demonstrated functioning thought processes and an ability to control his actions. The crux of Dr. Welner's testimony was that, based on the available evidence of Cheever's conduct before he used methamphetamine that morning and his conduct afterward, there was no observable change in Cheever's behavior, nor was there evidence that his perceptions or decision-making ability were impaired. (J.A. 125-26, 135-41.) In Dr. Welner's professional opinion, Cheever retained the ability to think before acting on the

morning he murdered Sheriff Samuels and was able to form the premeditated intent to kill. (J.A. 136-41.)

Dr. Welner's testimony thus mirrored the same central issues that Dr. Evans' testimony addressed. The two experts covered the same topics and relied on much of the same scientific evidence and reporting.

3. *Conviction, Sentence and Appeal.* The jury found Cheever guilty on all counts, and Cheever was sentenced to death for capital murder. On direct appeal, the Kansas Supreme Court reversed the capital murder and attempted capital murder convictions and the death sentence, holding that the admission of Dr. Welner's rebuttal testimony violated Cheever's Fifth Amendment privilege against self-incrimination. The court observed that "Cheever relies primarily on *Estelle v. Smith*, 451 U.S. 454 (1981), *Buchanan v. Kentucky*, 483 U.S. 402 (1987), and several related cases to argue that because he had not waived the privilege by presenting evidence of a mental disease or defect at trial, the State was precluded by the Fifth Amendment from using statements he made during Welner's examination, conducted as part of the federal case, against him." (Pet. App. 22.)

The court determined that, under Kansas law, Cheever's defense was "voluntary intoxication," and was not the same as or the equivalent of a claim of "mental disease or defect" as defined by Kansas statutes. As a result, the court opined that Cheever's intoxication defense would not—under Kansas law—have justified a court-ordered mental examination. Thus, the Fifth Amendment was violated because Cheever's defense did not waive his Fifth

Amendment privilege or open the door to the use of Dr. Welner's testimony as rebuttal. (Pet. App. 30-35.)

The court held:

> Cheever's evidence showed only that he suffered from a temporary mental incapacity due to voluntary intoxication; it was not evidence of a mental disease or defect within the meaning of K.S.A. 22-3220. Consequently, Cheever did not waive his Fifth Amendment privilege and thus permit his court-ordered examination by Dr. Welner to be used against him at trial.

(Pet. App. 34-35.)

SUMMARY OF THE ARGUMENT

I.A. The Court's precedents point to the clear answer to the Question Presented in this case. In *Estelle v. Smith*, 451 U.S. 454 (1981), the Court held that evidence from a court-ordered competency examination of a defendant could not be used against him in a capital sentencing proceeding when he had neither initiated the examination nor put his mental state in issue at trial. However, in *Buchanan v. Kentucky*, 483 U.S. 402, 422 (1987), the case that effectively controls the outcome here, the Court clarified the scope of *Smith*, holding that *Smith* does not apply "if a defendant requests such an evaluation or presents psychiatric evidence ...."

In *Powell v. Texas*, 492 U.S. 680, 685 (1989) (*per curiam*), the Court emphasized that in *Buchanan* "the Court held that the defendant waived his Fifth

Amendment privilege by raising a mental-state defense." *Powell* suggests that such a waiver necessarily occurs because "it may be unfair to the state to permit a defendant to use psychiatric testimony without allowing the state a means to rebut that testimony." *Id.* at 685. Read together, these three cases compel the conclusion that Cheever waived his Fifth Amendment privilege with respect to the court-ordered mental examination when he asserted a mental-status defense and presented evidence to support that defense, including his own expert witness.

I.B. The Kansas Supreme Court's decision also is contrary to general Fifth Amendment principles. This Court consistently has recognized that a defendant can waive the Fifth Amendment privilege against self-incrimination by taking actions inconsistent with the invocation of the privilege. *Berghuis v. Thompkins*, 560 U.S. 370, 130 S.Ct. 2250, 2262 (2010); *Mitchell v. United States*, 526 U.S. 314, 321 (1999); *North Carolina v. Butler*, 441 U.S. 369, 373 (1979).

Indeed, by way of close analogy, if a defendant "takes the stand and testifies in his own defense his credibility may be impeached and his testimony assailed like that of any other witness, and *the breadth of his waiver is determined by the scope of relevant cross-examination*." *Brown v. United* States, 356 U.S. 148, 154-55 (1958) (emphasis added). In this case, Cheever's deliberate decision to assert a mental-status defense and introduce evidence supporting that defense necessarily waived his Fifth Amendment privilege with respect to issues and evidence relevant to that defense. Cheever made a tactical trial decision here, and should be held to the consequences of his choices and actions.

Cases such as *New Jersey v. Portash*, 440 U.S. 450 (1979), and *Mincey v. Arizona*, 437 U.S. 385 (1978), holding that a compelled statement cannot be used for any purpose, are inapposite here. In those cases, the defendants were subjected to true governmental compulsion that was not in any sense of their own making while here, in contrast, Cheever himself made the decision that led to the court-ordered mental examination and, even then, he could have declined the examination without being sent to jail or intimidated by police. Furthermore, in both *Portash* and *Mincey*, the State was using the defendant's own unvarnished, compelled statements to impeach the defendant, not an expert's report of a mental evaluation of the defendants to rebut a mental-status defense.

I.C. A fundamental flaw in the Kansas Supreme Court's decision is that court's reliance on Kansas law to determine whether Cheever had waived his Fifth Amendment privilege against self-incrimination. "The question of a waiver of a federally guaranteed constitutional right is, of course, a *federal question controlled by federal law*." *Brookhart v. Janis*, 384 U.S. 1, 4 (1966) (emphasis added). A state could, of course, enact state laws or interpret its state constitution to afford greater protection than the Fifth Amendment provides, *as a matter of state law*. But a state cannot interpret the Fifth Amendment to afford greater protection than the Self-Incrimination Clause actually provides. *Oregon v. Hass*, 420 U.S. 714, 719 (1975).

Under *Buchanan*, when a defendant raises a mental-status defense and supports it with evidence, the prosecution may use evidence from a court-ordered mental examination to rebut that defense without

violating the Fifth Amendment. The admissibility of such evidence does not turn on the label attached to the defense or the titles or qualifications of the witnesses, nor does it matter whether the defense evidence itself is classified as "psychiatric" or "psychological," or something else. What matters is the *substance of the defense asserted* and the evidence actually presented.

II. When Dr. Welner's rebuttal testimony is laid alongside the testimony of Dr. Evans in Cheever's defense, it is clear that both experts addressed the same central issues regarding Cheever's mental status on the day he murdered Sheriff Samuels, and both experts opined on the same subjects. By raising his mental-status defense, Cheever made a deliberate tactical choice that was inconsistent with his invocation of the Fifth Amendment privilege. Thus, Cheever necessarily waived his privilege. The Fifth Amendment did not prohibit the State from responding to Cheever's mental-status defense with Dr. Welner's testimony.

ARGUMENT

I. WHEN A DEFENDANT PRESENTS A MENTAL-STATUS DEFENSE, THE FIFTH AMENDMENT PRIVILEGE IS WAIVED AND THE PROSECUTION MAY REBUT THAT DEFENSE WITH EVIDENCE FROM A COURT-ORDERED MENTAL EXAMINATION.

In *Estelle v. Smith*, 451 U.S. 454 (1981), the Court held that evidence from a court-ordered competency examination of a defendant could not be used against the defendant in a capital sentencing proceeding on the question of "future dangerousness" when he had

neither initiated the examination nor put his mental state in issue at trial. In *Buchanan v. Kentucky*, 483 U.S. 402, 422 (1987), however, the Court held that *Smith* does not apply "if a defendant requests such an evaluation or presents psychiatric evidence."

When a defendant asserts a mental-status defense – such as the "extreme emotional disturbance" defense at issue in *Buchanan* – giving rise to a court-ordered mental evaluation, and then presents evidence at trial to support the defense, "at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination .... The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution." *Id.* at 422-23. *See also Powell v. Texas*, 492 U.S. 680, 685 (1989) (*per curiam*) ("it may be unfair to the state to permit a defendant to use psychiatric testimony without allowing the state a means to rebut that testimony"); *id.* ("In that case [*Buchanan*], the Court held that the defendant waived his Fifth Amendment privilege by raising a mental-state defense.").

The Kansas Supreme Court here reached a result that is contrary to the reasoning of *Smith* and *Buchanan*, as well as general Fifth Amendment principles. The essential rationale of *Buchanan* is that a defendant cannot have his cake and eat it too, by asserting a mental-status defense and presenting evidence to support it but then expecting to be immunized at trial from contrary rebuttal evidence that is lawfully in the State's possession. In this case, Cheever attempted to do just that – present an allegedly scientific, mental-status defense (based on his

methamphetamine usage) through his own and expert testimony, while simultaneously seeking immunity from effective rebuttal by arguing that he was not raising a mental-status defense under Kansas law.

Ruling in Cheever's favor, the Kansas Supreme Court relied on Kansas statutory definitions of voluntary intoxication and mental disease or defect to draw an artificial *federal constitutional* distinction between the two state law defenses, a distinction that in fact fails to acknowledge that a voluntary intoxication defense necessarily is a "mental-status" defense for Fifth Amendment purposes. The Kansas Supreme Court's reasoning is inconsistent with this Court's Fifth Amendment precedents and, if followed, would undermine reliability in criminal trials without a constitutional command to reach such a result.[1]

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[1]Any issues regarding the scope of Dr. Welner's testimony are not properly before this Court for two reasons. First, such questions are not fairly subsumed within the Question Presented. Second, the Kansas Supreme Court did not rely on any such rationale in reversing the conviction and sentence here but, rather, relied solely on the fact that Dr. Welner was allowed to testify *at all* regarding Cheever's mental-status defense. If Dr. Welner's testimony somehow exceeded the scope of proper rebuttal regarding Cheever's mental-status defense, or improperly referred to inculpatory statements Cheever made to Dr. Welner, those issues would be addressed, if at all, on a remand from this Court to the Kansas Supreme Court, presumably to be considered under the relevant rules of evidence. Indeed, Respondent has represented to the Court that he "made this argument in the Kansas Supreme Court, but the court did not reach it." Brief in Opposition at 21.

A. *Buchanan v. Kentucky*, 483 U.S. 402 (1987), Establishes That When A Defendant Asserts A Mental-Status Defense And Supports It With Evidence, The Defendant Waives The Fifth Amendment Privilege With Respect To Evidence From A Court-Ordered Mental Examination Used To Rebut The Defense.

1. ***Estelle v. Smith* (1981).** The analytical starting point—but not the ending point as the Kansas Supreme Court erroneously believed—for answering the Question Presented is *Estelle v. Smith*, 451 U.S. 454 (1981). There, the defendant was charged with murder and the State announced it would seek the death penalty. 451 U.S. at 456. The district court *sua sponte* ordered a competency evaluation of the defendant by a psychiatrist, even though defense counsel had not raised competency or sanity issues. *Id.* at 457. Significantly, defense counsel did nothing to initiate the examination, nor was defense counsel even notified prior to the examination occurring. *Id.* at 459, n.5.

The mental evaluation in *Smith* was not used in the guilt phase of the trial, but was introduced during the penalty phase when the State called the examining psychiatrist to establish the defendant's "future dangerousness," a factor used in deciding whether to impose the death penalty under Texas law at that time. 451 U.S. at 458-60. The State presented this psychiatric evidence even though the defendant did not present a mental-status defense and did not call any expert witnesses with regard to sentencing. *Id.* The Court in *Smith* emphasized that the State did not present the expert psychiatric testimony to rebut any

evidence the defense presented but, rather, used the psychiatrist's testimony "as affirmative evidence to persuade the jury to return a sentence of death." *Id.* at 466.

Under those narrow and unusual circumstances, the Court held that such use of a court-ordered psychiatric evaluation violated the defendant's Fifth Amendment privilege against self-incrimination. 451 U.S. at 468-69. Specifically, the Court held that "[a] criminal defendant who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding." *Id.* at 468.

The Court further observed, however, that "[w]hen a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case." 451 U.S. at 465. The Court thus expressly left open the possibility that when a defendant raises a mental-status defense, such a tactical decision could constitute a waiver of the Fifth Amendment privilege. *Id.*

2. *Buchanan v. Kentucky* (1987). In *Buchanan v. Kentucky*, 483 U.S. 402 (1987), the Court addressed the question it reserved in *Estelle*, the very question that controls the outcome in this case. The defendant in *Buchanan* was charged with murder and raised an affirmative defense of "extreme emotional

disturbance."[2] 483 U.S. at 407-08. At trial, the defendant called a social worker who had been assigned to his case and had her read "from several reports and letters dealing with evaluations of [the defendant's] mental condition." *Id.* at 409-10. The State responded by having the witness read from another report of a psychological evaluation of the defendant that was conducted shortly after the defendant's arrest. *Id.* at 410.

The defendant claimed that permitting the State to use the second report violated his Fifth Amendment privilege against self-incrimination, but the Court rejected that argument. Instead, the Court held that the admission of the post-arrest psychological evaluation evidence to rebut the evidence the defendant offered in support of his mental-status defense did not violate the Fifth Amendment. 483 U.S. at 423-24. The Court distinguished *Smith*, pointing out

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[2] The "extreme emotional disturbance" defense at issue in *Buchanan* was not a state-law mental-status defense equivalent to an insanity or mental disease or defect defense. *See* 483 U.S. at 401 n.8 (citing *Gall v. Commonwealth*, 607 S.W.2d 97 (Ky. 1980), and *Wellman v. Commonwealth*, 694 S.W.2d 696 (Ky. 1985)). The Kentucky cases make clear that (1) "extreme emotional disturbance" is a phrase that, like "sudden heat and passion," differentiates the crimes of murder and manslaughter, and (2) "[t]he contention that mental illness and extreme emotional disturbance are one and the same is without merit." *Wellman*, 694 S.W.2d at 697. Thus, under this defense, a Kentucky jury may find that a mentally healthy person experienced an "extreme emotional disturbance," and that even a mentally ill person did not act under an "extreme emotional disturbance." The Kansas Supreme Court's reasoning, however, likely would have required a different result in *Buchanan*, which simply proves the Kansas court's error.

that, unlike in *Smith,* Buchanan's "entire defense strategy was to establish [a] 'mental status' defense." *Id.* at 423. Thus, Buchanan's tactical decision to raise a mental-status defense resulted in a different holding than *Smith*:

> if a defendant requests such an evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution.

483 U.S. at 422-23.

After *Buchanan*, it is apparent that *Estelle v. Smith* stands for a narrow proposition that has no application in the circumstances presented here. "Where, however, a defendant places his mental status at issue and thus relies upon reports of psychological examinations, he should expect that the results of such reports may be used by the prosecution in rebuttal." *Buchanan*, 483 U.S. at 425 n. 21. *Buchanan* established that a defendant waives his Fifth Amendment privilege with respect to evidence from a court-ordered mental exam when the defendant raises a mental-status defense and introduces evidence to support that defense.

Ultimately, the principles of *Estelle v. Smith* and *Buchanan v. Kentucky* are clear. The Kansas Supreme Court simply misapprehended the Fifth Amendment principles those cases establish. Furthermore, even if the line between *Estelle v. Smith* on the one hand, and

Buchanan v. Kentucky on the other, was not immediately clear after *Buchanan* was decided, any possible uncertainty was put to rest in *Powell v. Texas*, 492 U.S. 680 (1989).

3. *Powell v. Texas* (1989). In *Powell*, on the very day the defendant was arrested, the trial court ordered a psychiatric examination to determine competency to stand trial and sanity. The defendant was examined by two different mental health professionals on a total of six occasions. When the State then used the experts in the sentencing phase to testify to the defendant's future dangerousness, the defendant objected, arguing that the admission of such evidence violated his Sixth Amendment right to counsel because his attorney was never informed that the mental examinations would address future dangerousness. 492 U.S. at 681-82.

The Texas Court of Criminal Appeals rejected the Sixth Amendment argument, concluding that the defendant waived his Sixth Amendment right "by introducing psychiatric testimony in support of a defense of insanity" during the guilt phase of the trial. 492 U.S. at 683. After a GVR by the Court for reconsideration in light of *Satterwhite v. Texas*, 486 U.S. 249 (1988), the Texas Court of Criminal Appeals reaffirmed its original ruling, but this Court summarily reversed that decision.

Importantly, the Court drew a clear distinction between a Sixth Amendment right to counsel claim in this context and a Fifth Amendment privilege against self-incrimination claim. 492 U.S. at 683-84. Reviewing both *Estelle v. Smith* and *Buchanan v. Kentucky*, the Court pointed out that

> In *Smith* we observed that '[w]hen a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he has interjected into the case.' And in *Buchanan* the Court held that if a defendant requests a psychiatric examination in order to prove a mental-status defense, he waives the right to raise a Fifth Amendment challenge to the prosecution's use of evidence obtained through that examination to rebut the defense.

492 U.S. at 684 (internal citations omitted).

The Court emphasized that "the waiver discussions contained in *Smith* and *Buchanan* deal solely with the Fifth Amendment right against self-incrimination. Indeed, both decisions separately discuss the Fifth and Sixth Amendment issues so as not to confuse the distinct analyses that apply." 492 U.S. at 684. In contrast to those cases, the defendant in *Powell* was relying on a Sixth Amendment claim and the Texas courts erred by analyzing it as a Fifth Amendment claim instead: "While it may be unfair to the state to permit a defendant to use psychiatric testimony without allowing the state a means to rebut that testimony, it certainly is not unfair to require the state to provide counsel with notice before examining the defendant concerning future dangerousness." *Id.* at 685.

Here, the State's use of Cheever's court-ordered mental examination to rebut the mental-status defense he injected into the trial and supported with expert

testimony is controlled by the rule of *Buchanan*, as the *Powell* decision makes clear: "In [*Buchanan*], the Court held that a defendant waived his Fifth Amendment privilege by raising a mental-status defense." 492 U.S. at 685. Unlike in *Powell*, Cheever's mental examination evidence was introduced in the guilt phase of the trial as rebuttal evidence on the issue of intent, here premeditation, not to address a capital sentencing factor like "future dangerousness." Furthermore, there is no Sixth Amendment right to counsel claim before the Court. Thus, the Fifth Amendment waiver principles of *Estelle v. Smith*, *Buchanan v. Kentucky*, and *Powell v. Texas*, confirm that the Kansas Supreme Court erred.

B. Fifth Amendment Rights Necessarily Are Waived When A Defendant Presents A Mental-Status Defense Because A Contrary Conclusion Would Undermine Reliability In Criminal Prosecutions.

1. A defendant may waive the Fifth Amendment privilege by tactical decision or actions.

The Court consistently has recognized that a defendant can waive the Fifth Amendment privilege against self-incrimination by actions inconsistent with the invocation of the privilege. For example, "[i]t is well established that a witness, in a single proceeding, may not testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about the details." *Mitchell v. United States*, 526 U.S. 314, 321 (1999) (internal citations omitted); *see also North Carolina v. Butler*, 441 U.S. 369, 373 (1979) (a waiver of Fifth Amendment rights

can be "'inferred from the actions and words of the person'" or a "course of conduct indicating waiver"); *Berghuis v. Thompkins*, 560 U.S. 370, 130 S.Ct. 2250, 2262 (2010) (same).

Thus, by way of close analogy to this case, if a defendant "takes the stand and testifies in his own defense his credibility may be impeached and his testimony assailed like that of any other witness, and *the breadth of his waiver is determined by the scope of relevant cross-examination.*" *Brown v. United* States, 356 U.S. 148, 154-55 (1958) (emphasis added). Indeed, over fifty years ago the Court aptly described the purposes and limits of the Fifth Amendment privilege as follows:

> The witness himself, certainly if he is a party, determines the area of disclosure and therefore of inquiry. Such a witness has the choice, after weighing the privilege against self-incrimination against the advantage of putting forward his version of the facts and his reliability as a witness, not to testify at all. He cannot reasonably claim that the Fifth Amendment gives him not only this choice but, if he elects to testify, *an immunity from cross-examination on the matters he has himself put in dispute*. It would make of the Fifth Amendment not only a humane safeguard against judicially coerced self-disclosure but a positive invitation to mutilate the truth a party offers to tell.

Id. at 155-156 (emphasis added).

In this case, Cheever's decision to assert a mental-status defense and support that defense both with expert and his own testimony necessarily waived his Fifth Amendment privilege with respect to issues and evidence relevant to that defense. By his own decisions and course of conduct, not by virtue of any compulsion or improper action by the prosecution, Cheever acted inconsistently with the assertion of his Fifth Amendment privilege, and should be held to the consequences of his tactical decisions and actions.

The situation presented here is substantively the same as *Buchanan*. Like the defendant in *Buchanan*, Cheever's "entire defense strategy was to establish [a] 'mental status' defense." 483 U.S. at 423. Indeed, Cheever readily admitted, in his own testimony, that he shot and killed Sheriff Samuels. Although Cheever's defense was based on methamphetamine usage rather than the "extreme emotional disturbance" defense in *Buchanan*, both defenses are, substantively and objectively, mental-status defenses.

2. *Finding waiver in these circumstances is necessary to ensure reliability in the criminal process.*

The Kansas Supreme Court, however, missed the point of *Buchanan*, so plainly stated by the trial court in the *Buchanan* case: "you can't argue about [the defendant's] mental status at the time of the commitment of this offense and exclude evidence when he was evaluated with reference to that mental status." 483 U.S. at 412; *see also United States v. Byers*, 740 F.2d 1104, 1113 (D.C. Cir. 1984) (*en banc*) (plurality opinion by Scalia, J.) (courts "have denied the Fifth

Amendment claim primarily because of the unreasonable and debilitating effect it would have upon society's conduct of a fair inquiry into the defendant's culpability"); *Blaisdell v. Commonwealth*, 364 N.E.2d 191, 766 (Mass. 1977) (a jury should "have the benefit of countervailing expert views, based on similar testimonial statements of a defendant in discharging its responsibility of making a true and valid determination of the issues thus opened by a defendant.").

"We are, after all, always engaged in a search for truth in a criminal case so long as the search is surrounded with the safeguards provided by our Constitution." *Oregon v. Hass*, 420 U.S. 714, 722 (1975). Here, a court ordered Dr. Welner to assess specifically (1) "the relationship of methamphetamine and Scott Cheever's use of it on January 19th, 2005, to his killing Matthew Samuels," (2) the effects of Cheever's ongoing methamphetamine use, and (3) "to what degree that ongoing use over all of that time related to his behaviors in killing Matthew Samuels." (J.A. 111.) When Cheever presented the testimony of Dr. Evans and his own testimony on those very issues in support of Cheever's mental-status defense, Cheever acted contrary to his invocation of the Fifth Amendment privilege. His deliberate decisions and actions necessarily acted as a waiver of his Fifth Amendment privilege, at least with respect to the prosecution's use of Dr. Welner's evaluation to rebut Cheever's mental-status defense.

In this case, "the prosecution did no more than utilize the traditional truth-testing devices of the adversary process," *New York v. Harris*, 401 U.S. 222,

225 (1971), when it introduced Dr. Welner's testimony to rebut Cheever's mental-status defense. When there has been no waiver, the "Fifth Amendment ... is violated whenever a truly coerced confession is introduced at trial, whether by way of impeachment or otherwise," *Kansas v. Ventris*, 556 U.S. 586, 590 (2009). But when there has been a waiver by the defendant, constructive or otherwise, the "Government is not forbidden all resort to the defendant to make out its case." *Michigan v. Tucker*, 417 U.S. 433, 450 (1974). Instead, there is a "strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce." *Id.*

The *Buchanan* rule – if a defendant "presents psychiatric evidence," the defendant has waived the "Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution," 483 U.S. at 422-23 – is fully consistent with the Court's general Fifth Amendment and criminal procedure jurisprudence, case law that recognizes the societal interest in a fair inquiry and reliable verdict while still effectively protecting individual constitutional rights.

Barring the State's use of such evidence in rebuttal would unreasonably preclude the jury from considering relevant and reliable evidence about a matter *the defendant has affirmatively and deliberately injected* into the trial. "The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token

always forbid requiring him to choose." *Crampton v. Ohio*, 402 U.S. 183, 213 (1971).

Further, it is inherently unfair to allow the defendant to raise a mental-status defense without granting the State *any* meaningful opportunity to contest the defense through lawfully obtained rebuttal evidence. *Powell*, 492 U.S. at 685 ("it may be unfair to permit a defendant to use psychiatric testimony without allowing the state a means to rebut that testimony"); *Schneider v. Lynaugh*, 835 F.2d 570, 576 (5th Cir. 1988) ("It is unfair and improper to allow a defendant to introduce favorable psychological testimony and then prevent the prosecution from resorting to the most effective and in most instances the only means of rebuttal: other psychological testimony."); *United States v. White*, 21 F.Supp.2d 1197, 1200 (E.D. Cal. 1998) (observing that the "overarching rationale" of court decisions compelling a psychiatric examination of a defendant claiming insanity "is one of 'fundamental fairness' and 'judicial common sense.'")

In order to ensure reliable verdicts, the State must be permitted to present rebuttal evidence such as the evidence presented here once a defendant has raised a mental-status defense and introduced evidence in support of that defense. Unlike the situation where a defendant chooses to testify and the question is whether certain evidence may be used to impeach the defendant (and there often remain several other grounds for impeachment, such as prior convictions, for example), the *only* effective rebuttal evidence to a mental-status defense may be the results of a court-order mental examination. Reliability and fairness are

fundamental reasons the Court long has recognized that a defendant's actions inconsistent with the Fifth Amendment privilege necessarily may waive that privilege even with respect to unlawfully obtained or in some sense compelled evidence.

Thus, the Court has found waiver in a number of contexts, most especially when a defendant testifies at trial, *Oregon v. Hass*, 420 U.S. 714 (1975); *Michigan v. Tucker*, 417 U.S. 433 (1974); *Harris v. New York*, 401 U.S. 222 (1971), or when the defendant puts on a defense contrary to invocation of the privilege. *Buchanan v. Kentucky*, 483 U.S. 402 (1987). *See also Kansas v. Ventris*, 556 U.S. 586 (2009) (summarizing Fourth, Fifth and Sixth Amendment cases); *Crampton*, 402 U.S. at 215 ("it is not thought inconsistent with the enlightened administration of criminal justice to require the defendant to weigh such pros and cons in deciding whether to testify").

3. The Court's "compelled statement" cases are inapposite here.

Cases such as *New Jersey v. Portash*, 440 U.S. 450 (1979), or *Mincey v. Arizona*, 437 U.S. 385 (1978), have no bearing here. In those cases, there was no claim that the defendant had waived his Fifth Amendment privilege by virtue of raising and asserting a mental-status defense, or any other claim that the defendant's own decisions had initiated the creation of statements that might later be used against him. Furthermore, in both *Portash* and *Mincey*, the State was using the defendant's own unvarnished, compelled statements to impeach the defendant, not an expert's report of a

mental evaluation of the defendants to rebut a mental-status defense.

In *Portash*, for example, the defendant was subpoenaed to appear before a grand jury, *i.e.*, he was "told to talk or face the government's coercive sanctions, notably a sanction for contempt." 440 U.S. at 459. And in *Mincey*, "the undisputed evidence makes clear that Mincey wanted *not* to answer Detective Hust. But Mincey was weakened by pain and shock, isolated from family, friends, and legal counsel, and barely conscious, and his will was simply overborne." 437 U.S. at 402. In each case, the defendant did nothing to initiate the creation of the defendant's own statements, the very evidence the State later used to impeach the defendant.

This case is distinguishable in both respects. First, Cheever's own trial tactic – his decision to assert and support a mental-status defense – initiated the court-ordered mental examination. Cheever could have insulated himself from any such examination by withdrawing his mental-status defense. He faced no contempt of court or police intimidation.

Cheever, however, made a deliberate decision, one inconsistent with maintaining his Fifth Amendment privilege with respect to the mental examination. Indeed, the federal court ordered the mental examination *only because* Cheever asserted a mental-status defense when he gave notice under Fed. R. Crim. P. 12.2 (see Pet. App. 69-71), and Cheever's counsel certainly knew the effect of filing such a notice was likely to be a court-ordered mental examination. Under these circumstances, the fundamental purposes of the

Fifth Amendment are not contravened by allowing the State to use the results of that examination for the very limited purpose of rebutting Cheever's mental-status defense at trial.

Second, here the State presented the testimony of an expert who evaluated Cheever's mental state; the state did not simply introduce a transcript of prior compelled statements made by Cheever. Moreover, in the impeachment context, the prosecution generally will have considerable ability to impeach a defendant's testimony even without using any compelled statements of the defendant (*e.g.*, using prior convictions). In stark contrast, in the context of a defendant raising a mental-status defense, the prosecution realistically may not have any potentially relevant or effective rebuttal evidence except for a court-ordered mental examination.

Thus, unlike the defendants in *Portash* and *Mincey*, Cheever made a tactical decision to assert a mental-status defense, a decision that was inconsistent with his invocation of the Fifth Amendment privilege with respect to the court-ordered mental examination.

C. The Kansas Supreme Court Improperly Relied On The State Law Label That Court Attached To Cheever's Defense To Determine Whether He Had Waived His Fifth Amendment Privilege, Rather Than Focusing On The Substance Of Cheever's Defense And The Evidence He Actually Presented To Support The Defense.

1. The label state law attaches to a defense does not determine whether a defendant has waived the Fifth Amendment privilege.

A fundamental flaw in the Kansas Supreme Court's decision is that court's reliance on Kansas law to determine whether Cheever had waived his Fifth Amendment privilege against self-incrimination. (Pet. App. 31-35) (relying on a distinction in Kansas law between the state law defenses of mental disease or defect and voluntary intoxication, specifically Kan. Stat. Ann. §§ 22-3219 and 22-3220). That was constitutional error: "The question of a waiver of a federally guaranteed constitutional right is, of course, a *federal question controlled by federal law*." *Brookhart v. Janis*, 384 U.S. 1, 4 (1966) (emphasis added).

A state could, of course, enact state laws or interpret state constitutional provisions to afford greater protection than the Fifth Amendment provides, *as a matter of state law*. But a state cannot – or more precisely, here, a state supreme court cannot – interpret *the Fifth Amendment* to afford greater protection than the Self-Incrimination Clause actually provides. *Oregon v. Hass*, 420 U.S. 714, 719 (1975) ("a State is free as a matter of its own law to impose

greater restrictions ... than those this Court holds to be necessary upon federal constitutional standards. *But, of course, a State may not impose such greater restrictions as a matter of federal constitutional law when this Court specifically refrains from imposing them.*") (emphasis added) (internal citations omitted).

Thus, the Kansas Supreme Court's distinction between the state law defenses of mental disease or defect on the one hand, and voluntary intoxication on the other, may make a difference for state law purposes, but such a state-law distinction has no significance under the Fifth Amendment. Whether a court would have ordered an evaluation of Cheever had the case proceeded entirely under Kansas law – a point pressed by the defense in objecting to Dr. Welner's testimony, (J.A. 88-91.) – is irrelevant to the Fifth Amendment waiver analysis. The fact is Dr. Welner's evaluation of Cheever in the federal case was entirely lawful. Cheever's own deliberate, tactical decision to assert a mental-status defense initiated the court-ordered examination.

The Kansas Supreme Court's other fundamental mistake in this case was its failure to acknowledge that voluntary intoxication is a mental-status defense for Fifth Amendment purposes. That conclusion is inevitable if a court considers both the actual substance of the "voluntary intoxication" defense under Kansas law,[3] and the evidence Cheever introduced to support

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[3] *See* Kan. Stat. Ann. § 21-5205(b): "An act committed while in a state of voluntary intoxication is not less criminal by reason thereof, but when a particular intent or other state of mind is a

the defense. Indeed, there can be no debate in this case that Cheever put on a "mental-status" defense. Although he labeled his defense "voluntary intoxication" rather than "mental disease or defect" or "diminished capacity" or "insanity," the crux of Cheever's defense was that he did not possess the requisite mental state to premeditate and intend the murder of Sheriff Samuels.

The Kansas Supreme Court also turned a blind eye to the circumstances that gave rise to Dr. Welner's rebuttal testimony. The federal court order directing Cheever to undergo a mental examination was based precisely on Cheever's filing of notice in federal court under Fed. R. Crim. P. 12.2 that he would assert a mental-status defense based on his use of methamphetamine.[4] Thus, in the federal case, Dr. Welner's evaluation of Cheever was based on the very same grounds on which Dr. Welner testified in rebuttal in the state prosecution. Had Cheever presented Dr. Evans' testimony in the federal prosecution, there is no doubt that Dr. Welner's testimony would have been admissible in rebuttal. *See e.g. Hernandez v. Johnson*, 248 F.3d 344, 348 (5th Cir. 2001) ("As *Buchanan* teaches, defense counsel was on notice that if he

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necessary element to constitute a particular crime, the fact of intoxication may be taken into consideration in determining such intent or state of mind."

[4] "On the issue of guilt Mr. Cheever presently intends to introduce expert evidence relating to his intoxication by methamphetamine at the time of the events at the Cooper residence on January 19, 2005, which negated his ability to form specific intent, *e.g.*, malice aforethought, premeditation and deliberation." Pet. App. 70.

attempted to put mental status in play, the State might draw upon the [court-ordered] examination in rebuttal.").

The federal court result is the constitutionally correct result. By asserting a mental-status defense and presenting testimony to support that defense, Cheever acted inconsistently with the invocation of his Fifth Amendment privilege and necessarily waived the privilege with respect to Dr. Welner's testimony regarding Cheever's mental state at the time of the murder.

A fair reading of *Buchanan* leads to the inescapable conclusion that if a defendant makes the tactical decision to put mental state in play at trial, then the defendant waives the Fifth Amendment privilege with respect to evidence of mental state contained in the report of a court-ordered mental examination, *regardless of the label attached to the defense*. The Kansas Supreme Court articulated no principled explanation why Dr. Welner's testimony might have been admissible if Cheever raised a mental disease or defect defense, but was inadmissible for a voluntary intoxication defense. Similarly, it is by no means clear that Cheever's defense was actually a "voluntary intoxication" defense, especially given that his expert testified at length about the long-term effects of methamphetamine usage on the brain, which sounds like testimony addressing "mental disease or defect" territory rather than *temporary* "voluntary intoxication." The only way the Kansas Supreme Court can be correct is if *Buchanan* was wrongly decided.

2. *The substance of the defense asserted and the mental-status evidence actually presented determine whether a defendant has waived the Fifth Amendment privilege.*

Cheever asserted a mental-status defense and supported it with his own and expert testimony of a "psychiatric pharmacy specialist," the latter of whom opined about Cheever's state of mind at the time of the murder. (J.A. 32, 47-52.) By making these deliberate, tactical choices inconsistent with his continuing invocation of the privilege, Cheever necessarily waived his Fifth Amendment privilege with respect to evidence obtained from Dr. Welner's evaluation of Cheever. *Buchanan* and other federal Fifth Amendment cases make clear that what is determinative for constitutional purposes is not the label state law (or federal statutory law, for that matter) attaches to the defense, but the *substance* of the defense the defendant asserts and the evidence a defendant actually presents in support of that defense. 483 U.S. at 423.

Moreover, the lower federal courts have consistently endorsed the proposition asserted by the State of Kansas here – that when a defendant raises a mental-status defense and supports it with evidence, the Fifth Amendment privilege is waived and the prosecution may use evidence from a court-ordered mental examination to rebut the defense. The admissibility of such evidence does not turn on the label attached to the defense or the titles or qualifications of the witnesses, nor does it matter whether the defense evidence itself is classified as "psychiatric" or "psychological," or something else. What matters is the *substance of the defense asserted* and the evidence actually presented.

For example, in *United States v. Halbert*, 712 F.2d 388, 389-90 (9th Cir. 1983), a pre-*Buchanan* (but post-*Smith*) case, the defendant argued that because he raised a defense of diminished capacity rather than insanity, evidence from a court-ordered mental examination should not have been admitted in rebuttal against him. This argument is substantively indistinguishable from the argument Cheever made here because Cheever argued that he could not form the requisite mental state due to voluntary intoxication, rather than mental disease or defect.

The Ninth Circuit rejected such an arbitrary and artificial distinction. The court held that "Halbert's argument elevates form over substance," and that the psychiatric evidence was admissible as it "related to mental capacity in general," 712 F.2d at 3[illegible], an issue that the defendant put into play by asserting a mental-status defense and offering evidence in support of that defense. "Both defenses [] hinge on the workings of a defendant's mind at the time of the offense. No principled reason exists to allow psychiatric probing of these workings when insanity is at issue but to disallow it on the issue of diminished capacity." *United States v. White*, 21 F.Supp.2d 1197 (E.D. Cal. 1998) (citing *Halbert*). This reasoning is both sensible and entirely consistent with *Buchanan*.

Similarly, in *United States v. Curtis*, 328 F.3d 141 (4th Cir. 2003), the Fourth Circuit considered the Fifth Amendment claim of a defendant who introduced "expert testimony in support of his defense that he suffered from a 'cognitive dysfunction' which made him 'more susceptible to entrapment by government agents' and that this condition was caused by an explosion

resulting in a head injury he received while working in a steel mill ...." *Id.* at 142. The court had ordered a psychiatric evaluation after the defendant gave notice of this defense, and at trial "Curtis introduced testimony from his own psychiatrist and psychologist to support his mental status defense. The government then introduced psychiatric testimony [from the court-ordered evaluation] in rebuttal." *Id.* at 144.

The Fourth Circuit emphatically rejected the defendant's challenge to the propriety of the rebuttal evidence, pointing out that the government "called its own experts only to rebut Curtis's diminished capacity defense," *id.* at 144, and the "experts' testimony related solely to the validity of Curtis's alleged mental condition as to which he introduced psychiatric testimony." *Id.* The court held that "[w]hen a defendant asserts a mental status defense and introduces psychiatric testimony in support of that defense, he may face rebuttal evidence from the prosecution taken from his own examination .... That defendant has no Fifth Amendment protection against the introduction of mental health evidence in rebuttal." *Id.* at 144-45 (quoting *Savino v. Murray*, 82 F.3d 593, 604 (4th Cir. 1996)) (emphasis omitted).

Likewise, in *Schneider v. Lynaugh*, 835 F.2d 570 (5th Cir. 1988), the court read *Buchanan* to hold that "a defendant who puts his mental state at issue with psychological evidence may not then use the Fifth Amendment to bar the state from rebutting in kind." *Id.* at 575. The court further concluded that it did not matter that the defense witnesses "were not psychiatrists or psychologists, but social workers and counselors." 835 F.2d at 576. Such testimony was

presented as mental-status evidence within the ambit of *Buchanan*, allowing the State to present expert testimony in rebuttal. *Id.*

Cheever used an expert who testified directly and extensively about Cheever's mental state and Cheever's capacity to commit capital murder. In the Fourth, Fifth, and Ninth Circuits, it is clear that the prosecution would have been allowed to rebut Cheever's expert with Dr. Welner's expert testimony, a result that is fully consistent with the reasoning and holdings of both *Buchanan* and *Smith*. *See also Lee v. Thomas* 2012 WL 1965608, at *27 (S.D. Ala. 2012) ("Numerous courts have construed the *Smith/Buchanan* line of authorities as allowing the prosecution to put on psychiatric evidence where the defendant presents a defense relating to his mental state and utilizes expert testimony to advance it.").

The same would be true in a number of state courts. *See, e.g.*, *Hartless v. State*, 611 A.2d 581, 584 (Md. 1992) (most state courts "have found no constitutional impediment to allowing the State to secure a mental examination of a defendant and to present rebuttal expert testimony in cases involving mental status defenses other than insanity." *** "[T]he underlying concern is that in order for the State to be able to bear effectively its burden of proving guilt, or of meeting an affirmative defense, it must have the means to adequately assess and, if necessary, rebut a defendant's expert psychiatric testimony."); *State v. Fair*, 496 A.2d 461, 463 (Conn. 1985) ("A criminal defendant waives this [Fifth Amendment] privilege when he places his mental status in issue," and it is clear "that a defendant who claims extreme emotional disturbance

places his mental status in issue."); *State v. Hutchinson*, 766 P.2d 447, 452-453 (Wash. 1989) ("[A] defendant who asserts diminished capacity waives both the physician-patient privilege and the privilege against self-incrimination" because "there is no distinction between insanity and diminished capacity in this regard and [] the allowance of a privilege would deprive the State and the jury of important evidence on the defendant's mental condition.").

Thus, the lower federal and state courts generally have interpreted the *Smith* and *Buchanan* decisions correctly to mean that if a defendant raises a mental-status defense at trial and presents evidence to support that defense, such actions are inconsistent with continued invocation of the Fifth Amendment privilege. Indeed, such tactical decisions necessarily waive the privilege with respect to evidence of the defendant's mental state that is lawfully in the prosecution's possession, and the prosecution may use such evidence to rebut the defendant's mental-status defense. That is the correct result for all of the reasons explained above.[5] The Kansas Supreme Court's outlier decision should be reversed.

---

[5] Further, Cheever's expert relied on Dr. Welner's report in preparing for his testimony, as Cheever's counsel *expressly acknowledged on the record*. (J.A. 91) (defense counsel responding to trial court's question whether Dr. Evans relied on Dr. Welner's report, "That's true, he did."). That alone should waive Cheever's Fifth Amendment privilege with respect to Dr. Welner's evaluation. *See, e.g., White v. Mitchell*, 431 F.3d 517, 537 (6th Cir. 2006) (use of court-ordered psychiatric report, admittedly relied on by defense expert, to cross-examine that expert did not violate the Fifth Amendment).

II. THE STATE INTRODUCED MENTAL-STATUS EVIDENCE TO REBUT CHEEVER'S DEFENSE.

In support of his mental-status defense, Cheever presented the testimony of Dr. Evans. In particular, Dr. Evans opined that the chronic use of methamphetamine can lead to a "neurotoxic" phase of addiction in which the users develop "paranoid psych is" that leads to violence. (J.A. 42-43.) He offered his expert opinion that Cheever was suffering from such psychosis, demonstrating "stupid" judgment, and indeed that Cheever on the day of the murder had "no judgment at all." (J.A. 47-49.) Although Dr. Evans admitted that Cheever's "second shot" of Sheriff Samuels – a shot Cheever fired while the Sheriff lay gravely wounded and immobile on the stairs and after Cheever first retreated into the bedroom, spoke to his companion, and then returned to the stairs – was "a hard one" to explain under his opinion on psychosis and lack of judgment (J.A. 50), Evans still opined that Cheever lacked the mental ability to plan or premeditate the crime. (J.A. 51-52)

Only after Dr. Evans so testified did the State offer Dr. Welner as a rebuttal witness. A comparison of the testimony of Dr. Evans and Dr. Welner demonstrates beyond any doubt that the State's evidence was in "rebuttal" to the defense Cheever affirmatively raised and attempted to prove. Dr. Welner testified that, while Cheever was suspicious of the other people at the Cooper house on the day of the murder, he was "not antagonistic, he was not threatening, he was not violent, to any of these characters." (J.A. 122-23.) Dr. Welner opined that there "was nothing irrational"

about Cheever's activities that morning, (J.A. 124.), because:

> Methamphetamine use, if it intoxicates someone, it will cause a change in that person, physiologically, physically, behaviorally, and there were not signs from the history of a remarkable change in Scott Cheever after he used the methamphetamine that morning.

(J.A. 125-26.)

Dr. Welner countered Dr. Evans' opinion that Cheever was exercising "no judgment" that day, pointing out that when asked to stop shooting by Deputy Mullins, Cheever promptly complied: "If he had irrational fears about some sort of threat, it would have been insufficient to merely say 'stop shooting.'" (J.A. 139.) Dr. Welner ultimately concluded, contrary to Dr. Evans, that Cheever had the "ability to control his actions" on the day of the murder. (J.A. 141.)

The State did not use Dr. Welner's testimony in the State's case-in-chief but, rather, only to rebut the defense that Cheever affirmatively raised and sought to prove.[6] Cheever did not have to claim that methamphetamine use affected his ability to premeditate the crime, but he did. His assertion of the defense and presentation of evidence in support of it was a waiver of the Fifth Amendment privilege that

---

[6] Again, if there are questions about the scope of the rebuttal testimony, those are not properly before the Court at this time for the reasons explained in footnote 1 above.

may otherwise have existed with respect to the court-ordered and lawfully conducted mental evaluation by Dr. Welner.

When the testimony of Dr. Welner in rebuttal is laid alongside the testimony of Dr. Evans in Cheever's defense, it is apparent that both experts addressed the same central issues regarding Cheever's mental status and opined on the same subjects. In asserting his mental-status defense, Cheever made deliberate, tactical decisions that are inconsistent with his invocation of the Fifth Amendment privilege, at least with respect to evidence regarding his mental status on the day of the murder. Thus, Cheever necessarily waived his privilege, at least to that extent, and the Fifth Amendment did not prohibit the State from responding to Cheever's mental-status defense as it did here. To conclude otherwise would unreasonably deny the jury reliable and crucial information regarding the defendant's culpability on issues the defendant affirmatively raises and introduces into a trial.

*****

Only by misreading *Buchanan v. Kentucky*, by erroneously relying on Kansas law to determine whether Cheever waived his Fifth Amendment privilege, and by failing to respect fundamental principles of reliability and fairness in our adversarial criminal justice system, could the Kansas Supreme Court find a Fifth Amendment violation in this case. In effect, simply by labeling Cheever's defense as "voluntary intoxication" under Kansas law, the Kansas Supreme Court read the Fifth Amendment to permit Cheever to present an allegedly scientific, mental-

status defense through his own and expert testimony, while immunizing himself from effective rebuttal by the State. That result is error, however, because Cheever's tactical decisions waived his Fifth Amendment privilege, and it would be "unfair to the state to permit a defendant to use psychiatric testimony without allowing the state a means to rebut that testimony." *Powell*, 492 U.S. at 685.

CONCLUSION

The State of Kansas requests that the Kansas Supreme Court's decision be reversed.

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RESPONDENT'S BRIEF

RECORD
AND
BRIEFS

No. 12-609

IN THE
Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

SCOTT D. CHEEVER,

Respondent.

On Writ of Certiorari to the Supreme Court of Kansas

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QUESTION PRESENTED

Kansas presented the following question in its petition for certiorari:

When a criminal defendant affirmatively introduces expert testimony that he lacked the requisite mental state to commit capital murder of a law enforcement officer due to the alleged temporary and long-term effects of the defendant's methamphetamine use, does the State violate the defendant's Fifth Amendment privilege against self-incrimination by rebutting the defendant's mental state defense with evidence from a court-ordered mental evaluation of the defendant?

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IN THE

Supreme Court of the United States

No. 12-609

STATE OF KANSAS,
Petitioner,

v.

SCOTT D. CHEEVER,
Respondent.

On Writ of Certiorari to the Supreme Court of Kansas

BRIEF FOR RESPONDENT

INTRODUCTION

Petitioner's brief is devoted to arguing issues that are not in dispute. Respondent Scott Cheever agrees that state-law labels do not determine the Fifth Amendment's scope. Pet. Br. 31-40. Likewise, Cheever agrees it would be "unfair to allow the defendant to raise a mental-status defense without granting the State *any* meaningful opportunity to contest the defense[.]" *Id.* at 27. But that does not mean the Kansas Supreme Court's decision should be reversed. Rather, that court's unanimous decision should be affirmed for three independent reasons.

First, even assuming *arguendo* that a defendant waives the Fifth Amendment privilege when he puts on expert mental-state evidence, that waiver is limited: The government may use the defendant's compelled statements from a mental examination only to rebut what the defense expert raised. The

government's rebuttal here went much further. The defense expert testified only that Cheever was intoxicated and could not premeditate. The government's expert "rebutted" that opinion by using Cheever's compelled words to tell the jury Cheever had a bad character and to strongly suggest he had an immutable personality disorder. No waiver justified that testimony. It therefore violated the Fifth Amendment.

Second, there was no waiver in any event. Waivers must be *voluntary*, and a defendant who is forced to "waive" to mount a defense or present mitigating evidence against a possible death penalty is not acting voluntarily. The argument that this Court nonetheless must manufacture an implied waiver because otherwise mental-state defenses will be "immun[e] from rebuttal," U.S. Br. 23, is fallacious. Government experts regularly rebut mental-state defenses without using compelled testimony. And those experts have access to ample data to offer their opinions, as the events of this case illustrate.

At a minimum, if the Court finds that an implied waiver is appropriate in some circumstances, the waiver should be confined to situations where a defendant has introduced expert testimony to prove an affirmative defense. That limit ensures that the government has proven the elements of the crime through its own labors, as the Constitution requires.

Finally, there is no basis to find waiver on the facts here. A waiver must be knowing and intelligent, and Cheever did not knowingly and intelligently waive his rights because Kansas law told him that raising a voluntary-intoxication defense would *not* open the door to rebuttal based on a compelled examination.

The judgment below should be affirmed.

STATEMENT

A. Factual Background

1. Scott Cheever tried methamphetamine for the first time at age 17 and was "instantly hooked." Tr. 13.[1] Methamphetamine is a powerful stimulant that can be manufactured, or "cooked," at home by combing pseudoephedrine and anhydrous ammonia. J.A. 35-37. When injected, it delivers an intense and pleasurable "rush." Tr. 59; J.A. 38. But that sensation is ephemeral, leaving the user "paranoid" and "delusional"—"thinking the whole world's out to get you." Tr. 36. After Cheever's first taste of methamphetamine, it "took control of [his] life." Tr. 13. Cheever was "shooting enormous amounts of meth," and repeating "the same cycle over and over": "gather supplies," "cook," and "shoot." Tr. 37.

On January 19, 2005, Sheriff Matthew Samuels and two deputies drove to a house in Hilltop, Kansas to arrest Cheever. Cheever had been up all night cooking methamphetamine. Regular methamphetamine use makes it difficult to sleep, J.A. 45, and, leading up to the crime, Cheever had been awake for eight or nine days straight. Tr. 43. He was only able to "pass[ ] out" for about six hours the day before the crime by injecting himself with the opioid oxycodone. *Id.* On the morning of January 19, Cheever took a "large shot" of methamphetamine. Tr. 58. A "heavy user" would typically take about 20-30 units; he took 50-80 units that morning—enough to kill a "normal person." *Id.* The shot left Cheever "totally spooked," and "paralyzed with fear, thinking everybody [was] out to get [him]." Tr. 59. Less than an hour after

---

[1] "Tr." refers to trial transcript volume 4.

Cheever had injected himself, the sheriff and deputies arrived. Cheever was still "extremely high." *Id.*

Cheever hid in a room upstairs. He did not expect to be found because the stairway was concealed by a piece of carpet. Pet. App. 9. But the sheriff discovered the stairway and began to ascend. Cheever testified that at this point—still reeling from the injection of methamphetamine—he "panicked" and shot. Tr. 63-64. He did not plan to shoot the sheriff. *Id.* He retreated briefly to the room where he had been hiding, and then reemerged to shoot Samuels a second time. Pet. App. 9. The deputies pulled the wounded Samuels out of the stairwell, under fire from Cheever, and left the house for several hours.

Cheever, meanwhile, sat motionless upstairs. He testified that, as he waited, he "snapped out of it" and realized "what the heck [wa]s really going on." Tr. 69. He had a "totally emotional breakdown," and started to cry. *Id.* But when a SWAT team arrived, Cheever was convinced they intended to kill him. He fired at the team members, who returned fire. Pet. App. 9. Eventually, they subdued Cheever and arrested him. *Id.*

B. Events Prior To Trial

The resulting prosecution was procedurally tortuous. The case was filed in Kansas trial court. Pet. App. 10. But when the Kansas Supreme Court found the state's death penalty unconstitutional, *Kansas* v. *Marsh*, 102 P.3d 445 (Kan. 2004), the state proceeding was dismissed and federal charges were filed under the Federal Death Penalty Act, 18 U.S.C. § 3591. While the case was in federal court, Cheever filed notice under Federal Rule of Criminal Procedure 12.2(b) that he would be presenting expert evidence "[o]n the issue of guilt * * * relating to his

intoxication by methamphetamine," which "negated his ability to form specific intent." Pet. App. 69. The notice explained, "Cheever does not believe that this notice entitles the government to examine [him] under the provisions of Fed. R. Crim. P. 12.2(c)." *Id.* Nonetheless, the District Court ordered Cheever, pursuant to Rule 12.2(c)(1)(B), to undergo a psychiatric examination with Dr. Michael Welner, a forensic psychiatrist hired by the government. Welner's interview lasted five-and-a-half hours. Pet. App. 11.

Seven days into jury selection the federal case was suspended when Cheever's counsel became unable to proceed. By that time, this Court had restored the death penalty in Kansas, *Kansas* v. *Marsh*, 548 U.S. 163 (2006), so the case was moved back to state court. Cheever was charged with capital murder for killing Sheriff Samuels and attempted capital murder for firing on the other officers. Pet. App. 6. Kansas defines capital murder as the "intentional and premeditated killing of a law enforcement officer." Kan. Stat. Ann. § 21-3439(a)(5) (2005).

C. Cheever's Defense

At trial, Cheever did not shirk responsibility or try to justify his actions. Rather, he admitted he killed Sheriff Samuels. And he admitted the killing was "intentional." Tr. 99. His sole defense was that the short-term and long-term effects of methamphetamine abuse had prevented him from forming the premeditation that is a requisite element of capital murder. In support of this defense, Cheever called Roswell Lee Evans, Jr., a specialist in psychiatric pharmacy, as an expert witness. J.A. 32.

Evans began his testimony with some background information about methamphetamine. He explained that methamphetamine is a "very intense stimulant"

that is a "chemical derivative" of amphetamine. J.A. 36. He explained how the drug is produced and taken. J.A. 37-38. And he described its effects: An initial rush subsides quickly, but the drug lingers in the system for 13 or 14 hours. J.A. 38. "During that period of time," he testified, the user remains "legitimately intoxicated." *Id.*

Evans continued by describing how methamphetamine can change the "structure of the brain." J.A. 41. Neurons "begin to disappear." *Id.* "[G]ray matter in the brain begins to decrease," which "affects other parts of the brain that are more responsible for things like cognition, executive functions, judgment, * * * [and] [d]ecision-making." J.A. 41-42. Evans called this the drug's "neurotoxic" effect, which can interfere with "planning, looking at consequences, abstract reasoning, [and] judgment." J.A. 42. He cited a study showing that 80 percent of patients "develop a paranoid psychosis" from the drug. That makes it "difficult for them to make reasonable judgments because reality is quite distorted." J.A. 43. Violence issues "usually come at that stage of use"—that is, the neurotoxic and psychotic stage. *Id.*

Evans then discussed Cheever's case. Evans had interviewed Cheever, and he found Cheever "to be a sad but typical case of progressive methamphetamine use." J.A. 47. "He had progressed very rapidly to the point where he had developed neurotoxicity." *Id.* And Cheever "was showing symptoms of psychosis pretty consistently." *Id.* He was also demonstrating "really stupid judgment": "running away from perceived threats that were not real, being very suspicious of his friends, even suspicious enough to start carrying a weapon." J.A. 48. When the sheriff

arrived, Cheever was "not only neurotoxic but acutely intoxicated." J.A. 49. And when he saw the sheriff climbing the stairs, he had a reflexive, "hand-on-the-hot-pot reaction," "very much influenced by the meth use," that led him to open fire. *Id.* As Evans put it: "[T]here was no judgment at all. This man just did it." *Id.*

D. The Government's Rebuttal

The state then called Welner, the government-hired psychiatrist whom Cheever had been compelled to talk to under court order. The defense objected on two grounds. First, the defense maintained it had done nothing to trigger a compulsory examination of Cheever under state law, and that Welner should not, therefore, be permitted to testify based on a compelled examination in state proceedings. J.A. 88. Kansas law only authorizes the prosecution to conduct, and subsequently to use evidence from, a compelled examination when a defendant asserts a mental-disease-or-defect defense, and voluntary intoxication is not a "mental disease or defect" under Kansas law. *See infra* at 10. Cheever thus had not opened the door to rebuttal testimony based on the compelled examination.

Second, the defense explained that Welner's testimony would far exceed the scope of any waiver. The prosecution had summarized Welner's intended testimony as follows: "He's going to say that he examined Mr. Cheever and that Mr. Cheever has an antisocial personality, which would * * * explain his actions on that day." J.A. 89. The defense responded: "I don't think Evans presented any psychological view of antisocial personality. He talked about meth, Judge, and how meth, you know, affects an individual and how he thinks it affected Cheever, so I think

to go into antisocial personality disorder and psychological testing is clearly beyond the scope of what we presented." J.A. 92. The court, after telling the defense its objections were "well made * * * in terms of preserving [them] for the record," allowed the testimony. J.A. 94.

Welner briefly offered his opinion on Cheever's methamphetamine use. He said that "there were not signs from the history of a remarkable change in Scott Cheever after he used the methamphetamine" on the morning of the shooting. J.A. 126.

Welner then moved on to "personality disorders" as a possible alternative explanation for Cheever's behavior. According to Welner, "[w]hat a personality disorder is is that everybody else doesn't want you to be that way, but you want to be that way because it suits you." J.A. 133. The prosecution then asked, "in that vein," about Cheever's "fascination with outlaws." J.A. 134. Welner responded:

> [W]hat I came to learn in my interview is that Scott Cheever was one of these unusual people who's actually exposed to a variety of different people in his life. He had people who were criminal types. He had people who were not criminal types but who were drug users. He had people who were clean and straight and were athletes. * * * So what I found in the interview was that, from him, was that he found himself identifying with and looking up to people that he alternatively described as bad boys or outlaws, and looking up to them and being impressed and awed by them, and in certain instances wanting to outdo them.

Id. Later, Welner elaborated on this point:

> I don't think that the methamphetamine affected his decision to be an outlaw and to identify with outlaws and to make decisions as outlaws do. I think that it is possible, possible, that methamphetamine made him more aggressive. But it was making a person aggressive who was armed to begin with and who identified not only with outlaws but outlaws who were engaged in fatal shootouts with police officers.

J.A. 156-57.

Welner also gave a detailed narration of the crime itself, sometimes delivered in the first person, as though he were in Cheever's head:

> I make a decision not to shoot, but to be silent, with the hope that this person goes away. The person comes near me but turns, and I'm aware of his movements, and still I am quiet and I don't shoot and I don't move. * * * I shoot him at a point in which he is very much within my range, has passed through that curtain, and I know that he is coming upstairs, and that is when I shoot.

J.A. 130-31. Welner continued in that vein. He then gave another intimate narration of the events of the crime that spanned a whopping six transcript pages, without interruption. J.A. 137-41.

The overall effect of Welner's testimony, as the Kansas Supreme Court recognized, was "devastating": he had "employed a method of testifying that virtually put words into Cheever's mouth," and he had "characterized Cheever as a person who had chosen an antisocial outlaw life style and who was indifferent to the violence he had committed." Pet. App. 42. The jury found Cheever guilty and sentenced him to death. Pet. App. 10.

E. The Appeal

The Kansas Supreme Court unanimously reversed the capital-murder conviction. It noted that Kan. Stat. Ann. § 22-3219 authorizes a court to order a defendant to submit to a mental examination if he files a notice of intent to assert a mental-disease-or-defect defense, and that the "court-ordered examination remains privileged" unless "the defendant presents evidence supporting [such] a * * * defense at trial." Pet. App. 28 (citing *Kansas* v. *Foster*, 910 P.2d 848 (Kan. 1996), and *Kansas* v. *Williams*, 884 P.2d 755 (Kan. App. 1994)). But under Kansas law "[i]t is well established that voluntary-intoxication-induced temporary mental incapacity at the time of the crime is not evidence of a mental disease or defect." Pet. App. 32-33 (citing *Kansas* v. *Kleypas*, 40 P.3d 139 (Kan. 2001), and *In re Habeas Corpus Petition of Mason*, 775 P.2d 179 (Kan. 1989)). Though *permanent* mental impairment caused by drug use can qualify as a mental disease or defect, "Cheever did not present evidence * * * that his use of methamphetamine had caused permanent mental impairment." Pet. App. 34.

The court concluded that because Cheever had raised only a voluntary-intoxication defense, he did not present mental-disease-or-defect evidence that would waive his privilege in the compelled examination. Pet. App. 28. Therefore "allowing Welner to testify in rebuttal to the voluntary intoxication defense violated Cheever's rights under the Fifth and Fourteenth Amendments." Pet. App. 35.

SUMMARY OF ARGUMENT

Scott Cheever admitted killing Sheriff Samuels and put forth just one defense to avoid the death penalty: He argued he was too intoxicated to premeditate. According to Petitioner, Cheever—and every defendant—must pay a steep price for advancing this or any mental-state defense. When a defendant does so, Petitioner says, the prosecution can compel testimonial statements from the defendant. And then, the prosecution's expert can use those compelled statements against him at trial. Indeed, the expert is not even confined to rebutting the mental-state defense that justified this wholesale retreat from the Fifth Amendment, but instead can use those compelled statements to put damning character evidence before the jury.

That position is extraordinary; nowhere else in the criminal law is a defendant punished so harshly for simply advancing a defense. This Court should reject it for three reasons.

1. To begin with the narrowest ground: Even accepting *arguendo* that a defendant's presentation of expert mental-health testimony can waive the Fifth Amendment privilege, that waiver is not unlimited; the government's expert can use compelled statements only to rebut the mental-status defense actually raised. *Buchanan* v. *Kentucky*, 483 U.S. 402, 424 (1987). Here, the government blew past that limitation. Cheever's expert testified that Cheever was intoxicated and could not form the specific intent necessary for capital murder. In "rebuttal," the government's expert used Cheever's compelled words to (1) suggest Cheever had a personality disorder, (2) smuggle in character evidence about Cheever's

admiration of outlaws and life of crime, and (3) offer a long narrative of Cheever's inner experience of the crime, speaking as if he were in Cheever's head. By far exceeding the bounds of any "limited rebuttal purpose," *id.*, that testimony violated the Fifth Amendment.

2. If the Court were to reach Petitioner's broader argument, it should reject it. *Buchanan* does not stand for the broad waiver principle Petitioner espouses. *Buchanan*, in fact, is not a waiver case at all; it establishes instead that an "examination that the defendant requested" is not compelled, and thus that the Fifth Amendment is not implicated. *See* 483 U.S. at 422-23. The Court has never squarely accepted Petitioner's waiver rationale and should not do so here. As then-Judges Scalia and Ginsburg have recognized, to say a defendant "waives" his Fifth Amendment rights merely by mounting a mental-state defense is "at best a fiction." *United States* v. *Byers*, 740 F.2d 1104, 1113 (D.C. Cir. 1984) (en banc) (plurality op.).

Nor should the Court accept Petitioner's request to manufacture a waiver on policy grounds. The Court lacks "the authority to do so," *Melendez-Diaz* v. *Massachusetts*, 557 U.S. 305, 325 (2009), and in any event there is no need. Despite *amici*'s hyperbole, a defendant's mental-state evidence is not "immun[e] from rebuttal" if compelled statements are not used against him. U.S. Br. 23. Far from it: The prosecution still can put on a rebuttal expert, and that expert can draw from a wealth of data, including the defense expert's report, the transcript of that expert's examination, police reports, physical evidence, and witness interviews. Any claim that that is not sufficient would be wrong. Prosecutors regu-

larly introduce, and courts allow, expert opinions based on such sources. And this Court has blessed that approach.

At a minimum, even if this Court implies a waiver, it should limit that waiver to situations where the defendant raises an affirmative defense. That will ensure the prosecution "shoulder[s] the entire load" by proving every element of the crime, as the Constitution demands. *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 55 (1964) (quotation marks omitted).

3. In any event, on the facts of this case Cheever did not knowingly and intelligently waive his rights. Kansas law provided that by raising a voluntary-intoxication defense Cheever would *not* open the door to rebuttal based on a compelled examination. Pet. App. 28. That law does not, of course, change the meaning of the Fifth Amendment. But it *is* a fact relevant to waiver analysis, since one can only waive a constitutional right if "he knows what he is doing and his choice is made with eyes open." *Adams* v. *U.S. ex rel. McCann*, 317 U.S. 269, 279 (1942). Here Cheever's eyes were not open because the cases told him his action would not constitute a waiver.

ARGUMENT

I. THE STATE EXPERT'S TESTIMONY FAR EXCEEDED THE SCOPE OF ANY WAIVER.

The simplest problem with Petitioner's claim that introducing mental-state evidence waives the Fifth Amendment privilege is that even if it were correct, it does not mean the Kansas Supreme Court should be reversed. Such a waiver would not be limitless. Instead, the state could only introduce expert testimony based on a compelled examination for a "limited rebuttal purpose." *Buchanan*, 483 U.S. at 424. On this point there is no dispute; Petitioner agrees

that waiver should be recognized only "for the very limited purpose of rebutting [a] mental-status defense[.]" Pet. Br. 30. That concession costs Petitioner the case, because a "very limited" rebuttal is not what happened here. Welner's use of compelled statements to attack Cheever's character exceeded the scope of any waiver and violated the Fifth Amendment.

A. This Issue Is Properly Before The Court.

Apparently apprehensive of what this Court will find if it examines the scope issue, Petitioner and the United States both pre-emptively argue that the issue is not presented. Their efforts are ineffective—and in the case of the United States, inaccurate.

1. Petitioner first declares, without analysis, that "[a]ny issues regarding the scope of Dr. Welner's testimony * * * are not fairly subsumed within the Question Presented." Pet. Br. 15 n.1. That is wrong. The question presented, as Petitioner phrased it in the petition (and before Petitioner's merits brief tried to reword it), is whether the state "violate[d] [Cheever's] Fifth Amendment privilege * * * by rebutting [his] mental state defense with evidence from a court-ordered mental evaluation." Pet. i. The answer is: Yes, because the content of that rebuttal exceeded the bounds of any waiver. That is "a reply well within the question's scope." *U.S. Airways, Inc.* v. *McCutchen*, 133 S. Ct. 1537, 1548 n.7 (2013). The Fifth Amendment issue at the heart of this case cannot be answered in the abstract; it turns on what Welner actually said at trial. At a minimum, the scope issue is a "subsidiary question fairly included" in the question presented, S. Ct. R. 14.1(a), because the scope of Welner's testimony informs whether the rebuttal "violate[d] [Cheever's] Fifth Amendment

privilege." Pet i. *See United States* v. *Mendenhall*, 446 U.S. 544, 552 n.5 (1980) (question is fairly included where its determination "is essential to the correct disposition of the other issues in the case").

Petitioner's second argument—that the issue is "not properly before this Court" because "the Kansas Supreme Court did not rely on any such rationale," Pet. Br. 15 n.1—fares no better. The scope argument was raised and preserved below, as Petitioner and the United States concede. Pet. Br. 15 n.1; U.S. Br. 29 n.6. And Cheever identified it in the brief in opposition. BIO 7. This Court's cases are clear that a prevailing party may defend the judgment "on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered" by the courts below. *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979). That the Kansas Supreme Court did not reach the scope issue is no obstacle to review.

The United States tries a different tactic: It asserts that Cheever, in his brief in opposition to certiorari, "characterized" the scope issue "as a state-law issue appropriately left for remand." U.S. Br. 29 n.6 (citing BIO 5, 7, 10-11). The United States does not and cannot quote any specific language to support that claim, because it is wrong. In fact, the brief in opposition clearly characterized the scope issue as one of federal law on one of the very pages the United States cites: "[S]hould the court find that by raising a voluntary intoxication defense, [Cheever] waived his Fifth Amendment right to the extent necessary to rebut that defense, the district court erred when it ruled that the prosecution could go beyond rebuttal and offer its alternative theory of the case." BIO 7. The argument is that the Fifth

Amendment waiver is limited, and by exceeding the limited waiver, the state violated the Fifth Amendment. There is certainly nothing there to suggest that whether Welner exceeded the scope of rebuttal is an issue of state law.[2]

The United States also points to a later section of the brief in opposition. That section—pages 10 to 11—noted that the argument Kansas was advancing in its petition was not made below. Specifically, though Kansas' petition was based on Fifth Amendment waiver, the prosecution had argued below that "the fact that the evaluation was legally obtained rendered it admissible." BIO 10. The brief in opposition characterized *that* argument, advanced by the *prosecution*, as grounded in state law. *Id.* at 10-11. The United States' mischaracterization of the brief in opposition should not stop this Court from considering an issue comprehended by the question presented.

B. Welner's Testimony Exceeded the Scope of Any Waiver.

This Court should answer the Question Presented in the affirmative, and hold that the government's use of Cheever's compelled testimony exceeded the scope of any waiver.

1. The logic of the implied waiver Petitioner posits has its roots in parity: "the State must be permitted to present rebuttal evidence * * * once a defendant has raised a mental-status defense." Pet. Br. 27. Parity means parity; any waiver the Court might choose to imply should be no broader than the men-

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[2] Cheever's brief in the Kansas Supreme Court also framed the scope issue as one of federal law. *See* Cheever Appeal Br. 116 (Kan.), 2010 WL 7196356.

tal-status defense the prosecution seeks to rebut. And indeed, that is both the law and the position of the parties. In *Buchanan*, the Court approved use of an expert report only for a "*limited* rebuttal purpose," and it noted that the report did "not describe *any* statements by [the defendant] dealing with the crimes for which he was charged," but only "set forth * * * general observations about the mental state of" the defendant. 483 U.S. at 423-24. No more was admitted than what was strictly necessary for rebuttal. Likewise, in *Powell* v. *Texas*, 492 U.S. 680 (1989), the Court noted that a defendant would not "open[ ] the door to the admission of psychiatric evidence on *future dangerousness* by raising an *insanity* defense." *Id.* at 685 n.3 (emphases added). In other words, any waiver must be confined to the issue raised. Petitioner and its *amici* appear to agree. *See* Pet. Br. 30 (State may use "the results of [a court-ordered] examination for the very limited purpose of rebutting [a] mental-status defense at trial."); States' Br. 14 (permissible rebuttal defined as "only what is necessary to maintain a level playing field between the state and the defense").

The proper scope of any waiver is further illuminated by this Court's decisions on cross-examination of a testifying defendant—an analogy Petitioner and its *amici* press at length. Pet. Br. 24-25; U.S. Br. 12-17.[3] When a defendant elects to take the stand, he has "waived" his privilege insofar as he must submit

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[3] For reasons we explain *infra* at 34-37, the testifying-defendant analogy is unhelpful in analyzing whether asserting a mental-state defense waives the privilege in the first place. But the scope argument advanced in this Part assumes *arguendo* that there actually *is* a limited waiver. If that is so, Petitioner and its *amici* should be willing to live with the analogy they pressed to prove that point.

to cross-examination. But the resulting waiver is not limitless. Rather, he has waived the privilege "only * * * on *the matters he has himself put into dispute*." *Brown* v. *United States*, 356 U.S. 148, 155 (1958) (emphasis added); *accord Mitchell* v. *United States*, 526 U.S. 314, 321 (1999) ("The privilege is waived for the matters to which the witness testifies[.]"). That rule allows the defendant "himself * * * to determine[ ] the area of disclosure and therefore of inquiry." *Brown*, 356 U.S. at 155-56. The cross-examination questions must stay "within [the] scope" of the defendant's own testimony, *Mitchell*, 526 U.S. at 321, and a testifying defendant cannot be "compelled to furnish original evidence against himself." *Fitzpatrick* v. *United States*, 178 U.S. 304, 316 (1900).

Thus, for example, a defendant who takes the stand and testifies only that he never met an alleged co-conspirator cannot be asked on cross-examination whether he had a "conversation with respect to heroin" on a particular date. *Enriquez* v. *United States*, 293 F.2d 788, 794 (9th Cir. 1961). That is so because the question goes "far beyond the scope," *id.* at 793; it does not pertain to matters the defendant "himself put into dispute." *Brown*, 356 U.S. at 155. As one court put it more than a century ago: "[H]ere is the limitation of the waiver by an accused person of his constitutional privilege * * * by testifying. * * * He may be cross-examined upon the subjects of his direct examination, but not upon other subjects." *Harrold* v. *Territory of Okla.*, 169 F. 47, 51 (8th Cir. 1909). The treatises are in accord: They say the waiver is limited to cross-examination questions "necessary to provide the prosecution with a reasonable opportunity to test the defendant's assertions on

direct." 1 McCormick on Evid. § 129 (7th ed.); *accord* C.A. Wright *et al.*, *Federal Practice & Procedure* § 6166 (2d ed. 2013) (waiver's scope "should be fixed * * * by the extent to which cross-examination is necessary to test the truth of the accused's direct examination").

If anything, that limitation should be even more strictly observed in the context of rebuttal based on a compelled mental examination. The prosecution already will have had the opportunity to test the "assertions on direct," 1 McCormick on Evid. § 129, by cross-examining the person making those assertions: the defense expert. As a result, the danger of " 'distortion of facts by permitting a witness to select any stopping place in the testimony' "—which danger is the primary "justification[ ] for the rule of waiver in the testimonial context"—is minimal. *Mitchell*, 526 U.S. at 322 (quoting *Rogers* v. *United States*, 340 U.S. 367, 371 (1951)). *See infra* at 35. Moreover, for reasons discussed at length *infra* at 27-30, the implied waiver in this context rests on a much more tenuous rationale than testimonial waiver. It is a policy-driven "waiver" in derogation of the Fifth Amendment, and for that reason alone it should be construed narrowly if recognized at all.

2. Accordingly, this Court should hold that when a defendant introduces expert evidence regarding a mental-status defense, the prosecution may introduce expert evidence based on a compelled examination of the defendant only to the extent it is "necessary" to provide a "reasonable opportunity" to rebut the specific defense raised. 1 McCormick on Evidence § 129; *accord* States' Br. 14.

Some lower courts have offered specific guidance implementing this limitation. As one put it, the

prosecution "may *rebut* Defendant's mental status defense," but it may "not *prosecute* based upon Defendant's mental health." *United States* v. *Williams*, 731 F. Supp. 2d 1012, 1020 (D. Haw. 2010). Accordingly, "a defendant's decision to raise a mental status defense" does not "open[ ] the door" for the prosecution to use compelled testimony "to assert diagnoses or defects other than to rebut those specifically placed at issue by the defendant." *Id.* at 1019. Thus, for example, where the defendant asserted the mental condition of borderline intellectual function, the prosecution was limited to disproving that diagnosis; its experts could not use their compelled examination to "affirmatively assert that Defendant suffers from psychosis or Anti-Social Personality Disorder." *Id.* at 1020. Similarly, where the defendant asserted that his mental state was affected by substance abuse, the prosecution's experts could not use his compelled statements to determine whether he had a personality disorder. *United States* v. *Taylor*, 320 F. Supp. 2d 790, 794 (N.D. Ind. 2004). And where the defendant asserted the defense of mental retardation, the prosecution expert's tests had to "bear some reasonable relation to measuring mental retardation * * *. Otherwise, there is a danger that defendants will be improperly subjected to mental examinations beyond the scope of the precise issue they have tendered and their resulting waiver of constitutional rights." *Centeno* v. *Superior Court*, 117 Cal. App. 4th 30, 45 (2004). In cases such as these, positing alternative diagnoses and conditions was not *necessary* to provide a *reasonable opportunity* to rebut the specific defense the defendant advanced.

3. Welner's testimony exceeded the scope of proper rebuttal in three respects. First, Welner suggested a "personality disorder" as the cause of Cheever's actions, even though the defense expert had offered no opinion whatsoever on any alleged personality disorders. Second, Welner opined that Cheever was fascinated with and attached to the "outlaw" lifestyle—an attempt to launder character evidence through psychiatry. Finally, Welner offered what amounted to a first-person narrative of the shooting from Cheever's perspective, even purporting to inhabit Cheever's head. This testimony relied on Cheever's compelled statements. And none of it was necessary to provide Welner a reasonable opportunity to rebut the testimony of Cheever's expert, Evans, regarding voluntary intoxication.[4]

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[4] These discussions of personality disorders and the like are a regular feature of Welner's testimony. *See United States* v. *Mitchell*, 706 F. Supp. 2d 1148, 1192 (D. Utah 2010) (opining that defendant "suffers from one or more personality disorders"); *Commonwealth* v. *Baumhammers*, 960 A.2d 59, 90 (Pa. 2008) (opining that defendant "suffers from a personality disorder" and demonstrated a "lifetime pattern of irresponsibility"); *New Jersey* v. *Fortin*, 843 A.2d 974, 1017 (N.J. 2004) (antisocial personality disorder); *Francis S.* v. *Stone*, 995 F. Supp. 368, 387 n.118 (S.D.N.Y. 1998) (same); *Lanni* v. *New Jersey*, 177 F.R.D. 295, 302 (D.N.J. 1998) (narcissistic personality disorder). The Supreme Court of New Jersey has sharply criticized the prosecution's use of Welner in circumstances similar to this case. In *New Jersey* v. *Vandeweaghe*, the defense expert testified that the defendant was intoxicated and unable to form intent to kill. 827 A.2d 1028, 1031 (N.J. 2003). Welner then testified—purportedly in rebuttal—that the defendant had a "record of lawbreaking," "a longstanding history of being able to lie and lie successfully," and an "antisocial personality." *Id.* at 1031-32. The court found that the defendant's expert had not "opened the door" to Welner's testimony and that its admission was plain error requiring reversal. *Id.* at 1033-35.

a. As set forth *supra* at 6-7, Evans' testimony hewed closely to the issue at hand—voluntary intoxication. He talked about the drug's chemistry and its effects on a typical user. J.A. 36-38. And he opined on how the drug affected Cheever, generally and on the day in question. J.A. 47-49.

Welner, in rebuttal, did discuss methamphetamine use. J.A. 126. But, over the defense's objection, he then strayed far afield of anything in Evans' testimony. Most obviously, Evans never once discussed the possibility that Cheever had a personality disorder. As defense counsel put it, Evans "talked about meth," and how it "affects an individual." J.A. 92. In sharp contrast, the thrust of Welner's testimony—as summarized by the prosecution itself—was "that Mr. Cheever has an antisocial personality." J.A. 89. Welner began by explaining that one possible diagnosis he considered was antisocial personality disorder, *i.e.*, a disorder where "everybody else doesn't want you to be that way, but you want to be that way because it suits you." J.A. 133. Welner then explained, "in that vein," that Cheever had good role models (athletes and leaders) and bad ones (criminals and drug users) and chose to follow the latter. J.A. 134. By connecting those facts—drawn straight from Cheever's compelled statements—to a personality disorder, the testimony suggested that this was a trait immutable in Cheever.

Plainly, none of this discussion was "necessary" to give the prosecution a "reasonable opportunity" to rebut the defense Cheever actually advanced—voluntary intoxication. 1 McCormick on Evidence § 129. Cheever did not "open[ ] the door" to use his compelled statements to assert other diagnoses. *Williams*, 731 F. Supp. 2d at 1020. The prosecution

shoved that door open and, in so doing, violated the Fifth Amendment.

b. Welner also used compelled testimony to smuggle in character evidence irrelevant to anything put in issue by Cheever. He opined that Cheever chose to "look[ ] up to" to "bad boys" or "outlaws." J.A. 134. And he said Cheever was "impressed" and "awed" by outlaws and wanted to "outdo" them. *Id.* This was character evidence, plain and simple. It was intended to show that Cheever committed the crimes because he was attached to a particular way of life.

It is, of course, axiomatic that in a criminal case "character is not an issue * * * unless the prisoner chooses to make it one." *Greer* v. *United States*, 245 U.S. 559, 560 (1918) (Holmes, J.). That is so because character evidence is "said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record." *Michelson* v. *United States*, 335 U.S. 469, 476 (1948). Here, the state used a compelled interview to elicit damaging facts about Cheever's character. It then laundered those facts through the testimony of its expert. That had nothing to do with the defense Cheever raised through his expert, and it far exceeded the "limited rebuttal purpose" the Fifth Amendment permits. *Buchanan*, 483 U.S. at 423-24.[5]

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[5] The prosecution asked Evans on cross-examination whether the "defendant thought of himself as an outlaw," J.A. 59, and Evans assented. This does not change the scope analysis, for two reasons. First, Evans never connected this point to the concept of a personality disorder, as Welner did. It was clear Welner was suggesting this trait was innate—a fact that may have influenced the jury on guilt and at the penalty phase. Second, the *defense*, not the prosecution, "determines the area of * * * inquiry." *Brown*, 356 U.S. at 155-56. To say the "outlaw" material was within the scope because Evans was

c. Finally, Welner's extended narration of the crime essentially forced the defendant to testify in detail through the mouthpiece of a state expert. As the court below put it, Welner "g[ave] a moment-by-moment recounting of Cheever's observations and actual thoughts to rebut the sole defense theory that he did not premeditate the crimes." Pet. App. 42. Much of this narrative was in the first person—highlighting the privileged access Welner had been given to the "private enclave" of Cheever's personality. *Miranda* v. *Arizona*, 384 U.S. 436, 460 (1966) (quotation marks omitted). The state used that privileged access to establish premeditation, an element of capital murder in Kansas.

Courts have been especially vigilant about protecting the Fifth Amendment privilege when an expert ventriloquizes for the defendant like this. Indeed, *Buchanan* noted that the challenged report did "not describe[] *any* statements by [the defendant] dealing with the crimes for which he was charged." 483 U.S. at 423. That fact influenced the Court's analysis. And lower courts have held that a defendant who raises a mental-status defense may "waive[] his Fifth Amendment right to silence regarding mental health issues, but does not waive his right to remain silent regarding the details of the crime." *Lewis*

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asked about it on cross-examination would mean the *prosecution* can bootstrap new topics within the area of inquiry by asking particular questions of the defense expert.

Nor does Evans' assent to the outlaw question make the error harmless. As noted, Welner linked the identification with outlaws to a personality disorder, making it seem innate and immutable; Evans agreed to no such thing. Moreover, Cheever himself *denied* he shot the sheriff because he thought of himself as an outlaw. Tr. 147-48. Welner thus contradicted Cheever on a point crucial to the prosecution's case.

v. *State*, 970 P.2d 1158, 1171 (Okla. Crim. App. 1998); *see also State* v. *Rodriguez*, 807 N.W.2d 35, 38-39 (Iowa 2011); *Noggle* v. *Marshall*, 706 F.2d 1408, 1416 (6th Cir. 1983).

The Fifth Amendment, in short, "proscribes state intrusion" into the defendant's mind "to extract self-condemnation." *Couch* v. *United States*, 409 U.S. 322, 327 (1973). That is just what happened here.[6]

II. INTRODUCING EXPERT TESTIMONY ABOUT DEFENDANT'S MENTAL STATE DOES NOT WAIVE THE FIFTH AMENDMENT PRIVILEGE.

If the Court does not affirm on scope grounds, it must then confront the broader issue of whether a defendant waives his Fifth Amendment rights merely by putting on a mental-state expert. A defendant does not, for it is "at best a fiction to say that when the defendant introduces his expert's testimony he 'waives' his Fifth Amendment rights." *Byers*, 740 F.2d at 1113. And this Court "may not disregard" that reality by "relax[ing]" the Fifth Amendment's requirements to accommodate perceived "necessities of trial and the adversary process." *Melendez-Diaz*, 557 U.S. at 325. The arguments advanced by Petitioner and its *amici* do not overcome this straightforward analysis.

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[6] That Cheever testified and admitted to the basic facts of the crime does not change this conclusion. If anything, it made this an even more obvious Fifth Amendment violation: The state had ample opportunity to test Cheever's story by cross-examining him, so there was no need to force him to speak to an agent of the state to extract a separate narrative. *Cf. Buchanan*, 483 U.S. at 423 (fact that defendant did *not* testify weighed in favor of allowing the state's psychiatric evidence because state could not cross-examine defendant).

A. Using A Compelled Expert Examination Against The Defendant At Trial Violates The Fifth Amendment.

As a preliminary matter, it is common ground that, absent a waiver, introducing testimony based on a compelled psychiatric examination violates the Fifth Amendment. *Estelle* v. *Smith*, 451 U.S. 454 (1981), so holds, and Petitioner does not argue otherwise.

The text of the Fifth Amendment provides that no person "shall be compelled in a criminal case to be a witness against himself." The privilege "is a bar against compelling 'communications' or 'testimony[.]' " *Schmerber* v. *California*, 384 U.S. 757, 764 (1966); *accord Fisher* v. *United States*, 425 U.S. 391, 408 (1976). Ordering a defendant to speak to a government expert, and then using his words against him at trial, violates that privilege. After all, communications are "compelled" from a defendant when he is ordered to undergo an examination and told he must participate or lose the right to put on a defense. *Estelle*, 451 U.S. at 468; *South Dakota* v. *Neville*, 459 U.S. 553, 561 n.12 (1983) (describing "disclosures during a court-ordered psychiatric examination" as "compelled"). Those communications are testimonial, at least where—as here—"the State use[s] as evidence against [the defendant] the substance of his disclosures during the pretrial psychiatric examination." *Estelle*, 451 U.S. at 464-65. The compelled testimonial statements are used at trial for an "objective that [i]s plainly adverse" to the defendant. *Id.* at 465. And on the topic of compelled incriminating statements, this Court is categorical: They are "inadmissible" for "*all* purposes." *Michigan* v. *Harvey*, 494 U.S. 344, 351 (1990) (citing *New Jersey* v. *Portash*, 440 U.S. 450, 459 (1979)). It is therefore

unsurprising that this Court has held that the "Fifth Amendment privilege * * * is directly involved" in circumstances like this one. *Estelle*, 451 U.S. at 464.

The question in this case accordingly is not whether Welner's testimony violated the Fifth Amendment absent a waiver; all agree it did. *See* Pet. Br. 29 (Cheever had a "Fifth Amendment privilege with respect to the mental examination"). Rather, the question is whether Cheever "waived" his privilege.

B. Putting On Expert Mental-State Evidence Does Not Amount To A Waiver.

1. This Court should hold that there was no waiver, for reasons succinctly explained by then-Judge Scalia—joined by then-Judge Ginsburg and four others members of the D.C. Circuit sitting en banc—in *Byers*. There, as here, the government argued that defendants waive the privilege "by voluntarily making psychiatric evaluation an issue in the case." 740 F.2d at 1111. Judge Scalia rejected that argument, calling it "easy game." *Id.* at 1113. He wrote: "It seems to us at best a fiction to say that when the defendant introduces his expert's testimony he 'waives' his Fifth Amendment rights. What occurs is surely no waiver in the ordinary sense of a known and voluntary relinquishment, but rather merely the product of the court's decree that the act entails the consequence—a decree that remains to be justified." *Id.* at 1113. In so concluding, he rejected the significance of a point *amici* now emphasize: that the criminal process "is replete with situations requiring * * * difficult judgments as to which course to follow." U.S. Br. 23. He wrote: "[A]lthough the Constitution does not forbid every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights, it is doubtful

whether such a 'waiver' could meet the high standard required for a voluntary, 'free and unconstrained' relinquishment of the Fifth Amendment privilege." *Byers*, 740 F.2d at 1113 (quoting *Culombe* v. *Connecticut*, 367 U.S. 568, 602 (1961)).

Just so. There is no colorable case that Cheever "waived" his Fifth Amendment rights without emptying that word of its meaning.

"The ultimate test" of whether a valid waiver has occurred "remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness." *Culombe*, 367 U.S. at 602; *accord Colorado* v. *Spring*, 479 U.S. 564, 566 (1987) (Fifth Amendment waiver "is valid only if it is made voluntarily, knowingly, and intelligently"). Waiver must be "voluntary in the sense that it was *the product of a free and deliberate choice* rather than intimidation, coercion, or deception." *Berghuis* v. *Thompkins*, 130 S. Ct. 2250, 2260 (2010) (emphasis added) (quotation marks omitted).

There is no sense in which a defendant in Cheever's position makes a "free and deliberate choice" to incriminate himself. Instead, the defendant is *forced* to 'waive' the privilege in order to mount a defense or present mitigating evidence against a possible death sentence. If the defendant declines, his mental-state evidence is foreclosed. *See* Fed. R. Crim. P. 12.2.

This Court's decision in *Simmons* v. *United States*, 390 U.S. 377 (1968), underscores why that cannot be understood as a free choice. In *Simmons*, the Court considered whether testimony by a defendant at a suppression hearing could later be used to establish his guilt at trial. Though lower courts had allowed the testimony over Fifth Amendment objection on the ground that it was "voluntary," this Court reject-

ed that approach. *Id.* at 393-94. "[T]he assumption which underlies this reasoning is that the defendant has a choice: he may refuse to testify and give up the benefit. When this assumption is applied to a situation in which the 'benefit' to be gained is that afforded by another provision of the Bill of Rights, an undeniable tension is created." *Id.* at 394. "Thus, in this case [the defendant] was obliged either to give up * * * a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege * * *. In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another." *Id.*

So it is here. Defendants have a "fundamental constitutional right to a fair opportunity to present a defense." *Crane* v. *Kentucky*, 476 U.S. 683, 687 (1986). That right "would be an empty one if the State were permitted to exclude competent, reliable evidence" bearing on the defendant's mental state. *Id.* at 690. And yet if Petitioner prevails, defendants would be "obliged either to give up" that right or to "waive" the Fifth Amendment privilege. *Simmons*, 390 U.S. at 394. That is exactly the kind of choice this Court found "intolerable" in *Simmons*.

Indeed, the scope of the rule Petitioner seeks only exacerbates the problem. Note that Petitioner does not just argue for a waiver whenever a defendant puts on *expert* mental-state evidence; Petitioner argues for a waiver whenever a defendant puts on *any* mental-state evidence. *See* Pet. Br. 12 ("[W]hen a defendant raises a mental-status defense, *and supports it with evidence*, the prosecution may use evidence from a court-ordered mental examination to rebut * * * .") (emphasis added). But if a defendant must fear a compelled-testimony free-for-all the

moment he or his witnesses say anything touching on mental state, the result is easy to predict: Many defendants will choose not to testify and will refuse to call experts. This Court should reject a rule that would "chill some defendants from presenting their best defense—and sometimes any defense at all[.]" *James* v. *Illinois*, 493 U.S. 307, 314-15 (1990).

Cheever did not waive his privilege by putting on a mental-state defense. The constitutional violation certainly was not harmless, *see supra* at 8-10, and Petitioner has not argued otherwise. The decision ordering a new trial should be affirmed.[7]

C. Petitioner's Contrary Arguments Are Meritless.

Petitioner and the United States advance three arguments in response: (1) *Buchanan* controls this case; (2) offering expert mental-state evidence creates a waiver because, like a defendant choosing to testify, it is inconsistent with invocation of the privilege; and (3) this Court must imply a waiver or prosecutors will be unable to rebut mental-state defenses. None withstands examination.

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[7] The same outcome would obtain if one were to view this case through the lens of "forfeiture," instead of waiver. Kansas did not raise a forfeiture argument and cannot do so now. And in any event, the doctrine has no application here because forfeiture, like waiver, must be *voluntary*. *See Salinas* v. *Texas*, 133 S.Ct. 2174, 2180 (2013) ("[A] witness' failure to invoke the privilege must be excused where governmental coercion makes his forfeiture of the privilege involuntary."); *Florida* v. *Bostick*, 501 U.S. 429, 438 (1991) ("Citizens do not forfeit their constitutional rights when they are coerced to comply with a request that they would prefer to refuse."). Cheever's decision to "give up" his right not to have compelled statements used against him was not voluntary, as already discussed. *Supra* at 28-29.

1. *Buchanan.* Petitioner's brief never mentions the "voluntarily, knowingly, and intelligently" waiver test. Instead, Petitioner tries to skip that step by asserting that *Buchanan* already held that "when a defendant presents a mental-status defense, the Fifth Amendment privilege is waived[.]" Pet. Br. 13. That is incorrect. In fact, this Court has never squarely endorsed the waiver rationale; if it did so now, it would be breaking new ground.

In *Buchanan*, the defendant "attempted to establish the affirmative defense of 'extreme emotional disturbance' " at trial. 483 U.S. at 408. His sole witness was a social worker who read "reports and letters dealing with evaluations of petitioner's mental condition." *Id.* at 409. On cross-examination, the prosecution asked the social worker to read from a report of *another* evaluation made pursuant to a joint motion by the defendant and prosecution. *Id.* at 410. The trial court allowed parts of that report into the record, and the jury found the defendant guilty.

This Court affirmed over a Fifth Amendment challenge. It held that "if a defendant requests [a psychiatric] evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the *reports of the examination that the defendant requested.*" *Id.* at 422-23 (emphasis added). The Court emphasized that the defense had "joined in a motion" for the report at issue, and that the report itself set forth only "general observations about the mental state" of the defendant but did "not describe *any* statements by petitioner dealing with the crimes[.]" *Id.* In those circumstances, "introduction of such a report for this limited rebuttal purpose does not constitute a Fifth Amendment violation." *Id.* at 423-24.

The word "waiver" appears nowhere in *Buchanan*. Rather, the crucial feature of *Buchanan* seems to be that the examination in question was *jointly* requested. Thus any testimonial communications by the defendant in *Buchanan* were not "compelled," U.S. Const. amend. V, the Fifth Amendment was not violated, and no question of "waiver" was presented at all. *See United States* v. *Doe*, 465 U.S. 605, 611-12 (1984) (defendant's records "cannot be said to contain compelled testimonial evidence" when their preparation was "wholly voluntary," and thus prosecution can subpoena them without a Fifth Amendment violation); *State* v. *Worthington*, 8 S.W.3d 83, 92 (Mo. 1999) ("[S]ince Worthington initiated the examination, he was not compelled to testify against himself" and there was no Fifth Amendment issue); 1 McCormick on Evidence § 137. *Buchanan* does not support the broad waiver principle Petitioner urges.

The only time the Court has mentioned "waiver" in this context is in some language in dicta in *Powell*, *supra*, a short per curiam disposition of a Sixth Amendment case. In *Powell*, the trial court had ordered the defendant, at the state's request, to undergo a psychiatric examination, and neither the defendant nor his attorney was notified. 492 U.S. at 681-82. The Court held that the examination "was taken in deprivation of petitioner's right to assistance of counsel," and that there was "no basis for concluding that [the defendant] had waived his Sixth Amendment right." *Id.* at 686. The Court therefore reversed the conviction.

In the course of its analysis, the Court noted that language in *Estelle* and *Buchanan* "provides some support" for the idea that introducing psychiatric testimony is a Fifth Amendment waiver. *Id.* at 684.

After this non-committal characterization, the Court also described *Buchanan* as holding: "if a defendant requests a psychiatric examination in order to prove a mental-status defense, he waives the right to raise a Fifth Amendment challenge to the prosecution's use of evidence obtained through that examination to rebut the defense." *Id.*

As explained above, that characterization is questionable; *Buchanan* did not discuss, let alone hold, anything about waiver. Moreover, *Powell*'s mention of waiver was dicta; the Court held that the *Sixth* Amendment had been violated. *Id.* at 685-86. No Fifth Amendment question was presented. And this Court is "not bound to follow [its] dicta in a prior case in which the point now at issue was not fully debated." *Central Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356, 363 (2006). That is especially true of dicta in a per curiam opinion, issued without benefit of merits briefing and argument. *See U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 24 (1994) ("This seems to us a prime occasion for invoking our customary refusal to be bound by dicta, and our customary skepticism toward per curiam dispositions that lack the reasoned consideration of a full opinion.").

This Court thus has never held that a defendant waives his Fifth Amendment privilege by the bare act of introducing mental-state expert testimony, and it should not do so now. *Buchanan* is best understood to hold that when a defendant undergoes a psychiatric examination at his own request, his statements in that examination are not compelled, and no Fifth Amendment issue arises. Under *Buchanan*, if the defendant puts on mental-state expert testimony, the prosecution may rebut "with evidence from the reports of the examination that the defend-

ant requested." 483 U.S. at 422-23. Indeed, the prosecution may even obtain the full *transcript* of that examination and use it to prepare expert rebuttal. *See infra* at 39. Cheever has no quarrel with those principles. Both are a far cry from the much broader holding Petitioner requests: that if a defendant mounts a particular defense, the Fifth Amendment evaporates and the government may compel him to speak and use his statements against him.

2. Cross-Examination Analogy. Petitioner next argues that Cheever waived his rights because by advancing a mental-state defense, he "acted inconsistently with the assertion of his Fifth Amendment privilege." Pet. Br. 24. This supposed inconsistency is based on a "close analogy": Just as a defendant who takes the stand waives the privilege insofar as he can be cross-examined, so too a defendant who presents expert mental-status testimony waives the privilege insofar as the state can introduce testimony from a compelled mental examination. *Id.* at 23; *see also* U.S. Br. 12-17.

The analogy breaks down under scrutiny. For starters, the text of the Fifth Amendment says the accused cannot "be compelled * * * to be a witness[.]" The implication of this language is that once a defendant *has* become a "witness," voluntarily, the privilege no longer applies. To be a "witness" at trial is "inconsistent[ ]" with the privilege, Pet. Br. 24, in a literal way. Similarly, a defendant can waive his right to remain silent by *speaking* after receiving *Miranda* warnings; once again, it is impossible both to speak and to remain silent. *See Berghuis*, 130 S. Ct. at 2262. That is precisely why there is a limited waiver. *See Fitzpatrick*, 178 U.S. at 315 ("Where an accused party *waives his constitutional privilege of*

silence, takes the stand in his own behalf and *makes his own statement*, it is clear that the prosecution has a right to cross-examine * * * .") (emphases added).

The same cannot be said of inviting an expert to testify about the defendant's mental state. The United States asserts that when a defendant does so, he is "present[ing] *his own statements* at trial," just as if it were "his own testimony." U.S. Br. 22 (emphasis added). That description is not accurate. The defendant is not presenting his own statements, and he has not become a "witness." Indeed, he has not chosen to speak at all, except to the extent he speaks in private to his own expert witness to help the witness form an opinion.

There is another deep flaw with the analogy. The rationale for waiver when the defendant takes the stand is that "a contrary rule 'would open the way to distortion of facts by permitting a witness to select any stopping place in the testimony.' " *Mitchell*, 526 U.S. at 322 (citation omitted). If a witness could "pick and choose" what facts to discuss it would "diminish[ ] the integrity of the factual inquiry." *Id.* Cross-examination is needed so the defendant's story can be subjected to the "antiseptic test of adversary process." *Brown*, 356 U.S. at 155.

These concerns are absent here. That is because the core of an expert's testimony is his *opinion*. *Williams* v. *Illinois*, 132 S. Ct. 2221, 2239-40 (2012). And when a defense expert testifies, the prosecution can cross-examine the expert on that opinion, attacking the opinion itself as well as the facts that undergird it. The expert's testimony is subjected to the full "adversary process." *Brown*, 356 U.S. at 155.

The United States argues that the decision whether to put on mental-health evidence and risk rebut-

tal, like the decision whether to testify and face cross-examination, is merely a " 'choice of litigation tactics,' not an impermissible burden on the defendant's Fifth Amendment privilege." U.S. Br. 23 (quoting *Jenkins* v. *Anderson*, 447 U.S. 231, 238 (1980)). That argument elides the underlying question at issue: Is there a waiver? In the cross-examination context, there is; a defendant who becomes a witness has acted inconsistently with the privilege. That fact creates a tactical choice for a defendant who wishes to testify; he knows that if he testifies he will waive his rights, and he can choose whether to do so. Here, by contrast, *there is no waiver in the first place*; the defendant who advances mental-state evidence has not chosen to speak to the government or to be a witness. The "tactical choice" thus arises only if a court proclaims, by judicial fiat, that presenting a mental-state defense will cost the defendant his constitutional rights. That is "a decree that remains to be justified." *Byers*, 740 F.2d at 1113.

The United States also argues that letting the prosecution use compelled testimony in this circumstance is no different than letting it impeach a testifying defendant using other evidence that "would not otherwise be available to the prosecution," such as evidence obtained in violation of *Miranda*. U.S. Br. 25-26. That is incorrect for two reasons. First, as the United States concedes (at 26 n.4), "compelled incriminating statements are inadmissible" for "*all* purposes," including "impeachment purposes." *Harvey*, 494 U.S. at 351. Cheever's statements in this case were compelled. *See supra* at 26-27. The fact that prosecutors can impeach using statements that were *not* compelled, but merely obtained in violation of *Miranda*'s prophylactic rule,

is irrelevant. Second, every case the United States cites takes pains to distinguish between *substantive* use of evidence and use for *impeachment*. *See Kansas* v. *Ventris*, 556 U.S. 586, 593 (2009) ("It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can * * * provide himself with a shield against contradiction of his untruths."); *United States* v. *Havens*, 446 U.S. 620, 628 (1980); *Harris* v. *New York*, 401 U.S. 222, 224 (1971). Thus the United States' concession that the compelled evidence here was used "substantively as opposed to only for impeachment purposes," U.S. Br. 26, is fatal to its analogy.[8]

3. Policy Arguments. Finally, Petitioner argues that this Court simply *must* manufacture an implied waiver, because absent the use of compelled testimony the government will have no "meaningful opportunity to contest the defense." Pet. Br. 27. The United States doubles down on this policy argument, asserting more than a dozen times that absent an implied waiver, the defendant will be able to present a "one-sided" mental-state defense, "free from challenge" and "immun[e] from rebuttal" because the prosecution will have no "opportunity to respond." U.S. Br. 7-12, 16-17, 20, 22-24, 26. This argument should be rejected for two reasons: First, it cannot overcome the Fifth Amendment. Second, it is factually incorrect.

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[8] Nor does it matter that the prosecution used Cheever's compelled statements in rebuttal instead of its case in chief. *See id.* The relevant question is not case-in-chief versus rebuttal; it is whether the prosecution used the evidence during its "direct case, *or otherwise*, as substantive evidence of guilt." *Havens*, 446 U.S. at 628. Here it did.

a. "The language of the Fifth Amendment * * * is unequivocal and without exception," *In re Gault*, 387 U.S. 1, 47 (1967), and courts cannot "relax the requirements" of the Amendment "to accommodate the necessities of trial and the adversary process." *Melendez-Diaz*, 557 U.S. at 325. In *Melendez-Diaz*, the government made just such a request to "relax" the Bill of Rights. This Court answered in terms equally applicable here:

> It is not clear whence we would derive the authority to do so. The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury *and the privilege against self-incrimination.* The Confrontation Clause—*like those other constitutional provisions—is binding, and we may not disregard it at our convenience.*

Id. (emphases added). So too here. Petitioner seeks to compel a defendant to give evidence against himself because it is "expedient[ ]" for Petitioner—precisely what this Court has pledged to "jealously guard[ ]" against. *United States* v. *Mandujano*, 425 U.S. 564, 588 (1976). There is no warrant for overriding the Fifth Amendment on grounds of "fairness" to the prosecution. "[T]he privilege is premised on an *a priori* belief that a 'fair state-individual balance' is one in which incriminating testimony is not compelled. The value [of fairness] underlies the privilege; it does not condition its application." *Byers*, 740 F.2d at 1159 (Bazelon, J., dissenting).

b. In any event, the unfairness argument is factually inaccurate; mental-state defenses are not "immun[e] from rebuttal" if the government cannot use compelled testimony. U.S. Br. 23. In fact, the state could—and would—call a rebuttal expert even under

Cheever's proposed rule. And that expert would have a wealth of materials with which to develop his rebuttal opinion.

For starters, under *Buchanan* the state could obtain "the reports of the examination that the defendant requested." 483 U.S. at 422. But the state—and thus its expert—also could obtain much more. First, it could obtain a "summary" of the "bases and reasons" for the defense expert's opinion. Fed. R. Crim. P. 16(b)(1)(C). Second, it could seek the "facts or data" underlying that expert's opinion "on cross-examination." Fed. R. Evid. 705. Third, the state's expert would have access to the data the state itself had collected—police and toxicology reports, the defendant's papers, interviews with friends and family of the accused, interviews with witnesses, and so on. Finally—and importantly—there would be no Fifth Amendment impediment to the state obtaining the transcript of the defense expert's interview itself. After all, *Buchanan* stands for the proposition that statements made in that interview were not compelled. 483 U.S. at 422-23; *see Doe*, 465 U.S. at 611.

Indeed, this case exemplifies how much data is available to the state without a compelled examination. As Welner himself described his process:

> I asked for the police reports, I asked for all witness interviews, I asked for all reports that had been provided by any doctors who had evaluated Mr. Cheever, I asked for any history about previous criminal behavior or previous behavioral incidents; I asked for any history that was available about his substance abuse or substance dependence, so that I might learn about how effects manifested themselves in Mr. Cheever; and asked to review any available information from people that

> he knew that might shed light, to me, on their observations of him when he was using, when he was not using.
>
> Once I reviewed those materials, then it led me to ask for * * * letters that he wrote in which he was more expressive and were a window of history to help me become more informed, incident reports from custody * * * [and] a number of other sources that were also inspired by that first pass, including * * * the neuropsychological testing of Dr. Price and the report of Dr. Evans[.]

J.A. 112-13. In short, the state's expert would have ample data. The only thing the state's expert could *not* do is use the state's sovereign power to force words from the defendant's lips. The proposition that the state would lack "*any* meaningful opportunity to contest" Cheever's voluntary-intoxication defense, Pet. Br. 27, is self-refuting.

Petitioner may respond that government experts cannot present rebuttal without conducting their own personal examination. Not so. In fact, prosecutors regularly offer—and courts regularly accept—diagnoses and rebuttals from mental-health experts who have not conducted personal interviews. *See, e.g.*, *California* v. *Clark*, 261 P.3d 243, 307 (Cal. 2011) (prosecution expert diagnosed defendant without personal interview); *Underwood* v. *Oklahoma*, 252 P.3d 221, 245 (Okla. Crim. App. 2011) (prosecution expert rebutted defense expert's mental-state diagnosis without personal interview); *United States* v. *Davis*, 611 F. Supp. 2d 472, 497 (D. Md. 2009) (expert diagnosed defendant as mentally retarded based on review of other experts' reports); *Woodward* v. *Mississippi*, 843 So.2d 1, 11 (Miss. 2003) (prosecution expert rebutted defense's mental-

state diagnosis based on transcripts of defense expert's interview); *Cook* v. *State*, 858 S.W.2d 467, 475 (Tex. Crim. App. 1993) (based on hypothetical, government psychiatrist testified as to defendant's future dangerousness); *North Carolina* v. *Bonney*, 405 S.E.2d 145, 151-52 (N.C. 1991) (prosecution expert rebutted defense's mental-state diagnosis without personal interview). And this Court has approved the practice: It held that psychiatric experts "may give their opinions not only to the state of a patient they may have visited * * * but also in cases where they have not themselves seen the patient, and have only heard the symptoms and particulars of his state detailed by other witnesses[.]" *Barefoot* v. *Estelle*, 463 U.S. 880, 903 (1980); *accord United States* v. *Davis*, 93 F.3d 1286, 1294 (6th Cir. 1996) (prosecution can "meet expert defense evidence in a variety of ways," including "review of evidence relied upon by the defense expert").

Indeed, Petitioner itself routinely defends against claims that a compelled psychiatric examination is the only way to test the veracity of a key witness, and routinely prevails. In Kansas, defendants often claim that the complaining witness in a sex-crime case should be subject to a compelled psychiatric examination. *See, e.g.*, *Kansas* v. *Price*, 61 P.3d 676, 680-84 (Kan. 2003). The Kansas Supreme Court regularly rejects that argument. *See id.*; *accord, e.g.*, *Kansas* v. *McIntosh*, 58 P.3d 716, 722 (Kan. 2002). And the court's explanation mirrors Cheever's: Defendants have access to videotapes of the prosecution expert's examination, among other data, and are free to "put forth [their] own experts to testify as to whether [the prosecution's expert]'s conclusions [are] accurate." *McIntosh*, 58 P.3d at 722.

Petitioner may say that while an expert *can* rebut a mental-state defense without a compelled examination, that rebuttal will not be quite as weighty as it would be if its expert could tell the jury he conducted such an examination. But such an attenuated policy claim is no match for the Fifth Amendment. It is one thing to say the Court must ignore *Melendez-Diaz* and manufacture a waiver because otherwise the government will have *no* opportunity for rebuttal. It is quite another to say the Court must do so because otherwise the government will not have exactly the rebuttal it desires. The Fifth Amendment "may make the prosecution of criminals more burdensome"; it is "binding" nonetheless. *Melendez-Diaz*, 557 U.S. at 325.[9]

There was no waiver here. The Kansas Supreme Court was right to reverse Cheever's conviction and remand for a new trial.

D. At A Minimum, Any Implied Waiver Should Be Limited To Affirmative Defenses.

Even if the Court agrees with Petitioner that presentation of expert mental-status evidence waives the Fifth Amendment privilege, that waiver should be limited to *affirmative* defenses. The reason is simple: As the United States acknowledges, "the government cannot meet its burden of proof 'by the simple cruel expedient of forcing [the necessary evidence] from [the defendant's] own lips.' " U.S. Br. 21 (quoting *Estelle*, 451 U.S. at 462). When the

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[9] The Court could further eliminate any risk of unfairness in federal trials by instructing that defense counsel may not comment upon the fact that the government expert did not conduct a personal examination. *See Dickerson* v. *United States*, 530 U.S. 428, 437 (2000) (Court has "supervisory authority" over federal-court "evidence and procedure").

prosecution uses a compelled examination of the accused to prove an element of the crime, that principle is violated. That is what happened here.

1. The "basic pupose[ ]" of the Fifth Amendment privilege is to ensure that "the guilty are not * * * convicted unless the prosecution 'shoulder[s] the entire load.'" *Tehan* v. *United States ex rel. Shott*, 382 U.S. 406, 415 (1966). At a minimum, the prosecution's "load" is to "prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged." *Patterson* v. *New York*, 432 U.S. 197, 210 (1977); *In re Winship*, 397 U.S. 358, 364 (1970). The state only carries that burden if it proves those elements "by the independent labor of its officers," *Culombe*, 367 U.S. at 582; it "must establish its case, not by interrogation of the accused even under judicial safeguards, but by evidence independently secured through skillful investigation." *Watts* v. *Indiana*, 338 U.S. 49, 54 (1949). Thus, to quote the United States again, the government cannot use a compelled mental-health examination "as affirmative evidence." U.S. Br. 21. Petitioner makes a similar concession: Waiver is only operative when "the defendant has *affirmatively* and deliberately injected [a matter] into the trial." Pet. Br. 26 (emphasis added).

The state, then, may not use testimony from a compelled psychiatric examination to prove an element of a crime. When a defendant raises an affirmative defense, however, he has "interjected" a new issue into the case. *Estelle*, 451 U.S. at 465. By definition, it is the *defendant* who must "shoulder the load" on an affirmative defense, not the state. It thus does less violence to the Fifth Amendment to imply waiver in the affirmative-defense context,

because it does not relieve the prosecution of the obligation of proving "all of the elements included in the definition of the offense of which the defendant is charged." *Patterson*, 432 U.S. at 210.

2. This Court has implicitly recognized the distinction between using a compelled examination to prove guilt and to rebut an affirmative defense. The dicta in *Estelle* which, according to Petitioner, suggested the waiver concept, reads: "When a defendant asserts the *insanity* defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case." 451 U.S. at 465 (emphasis added). It is notable that *Estelle* specifies the insanity defense—an affirmative defense under Texas law, Tex. Pen. Code § 8.01—as the trigger for a compelled examination. The sentence could just as easily have begun: "When a defendant introduces psychiatric testimony." In *Buchanan*, similarly, the Court specifically noted that "extreme emotional disturbance" was an "affirmative defense," and that the "defendant has the burden of production on this defense." 483 U.S. at 408 n.8.

Moreover, *Estelle* speaks of an issue that the defendant has *interjected*. An affirmative defense is truly "interjected" by the defendant because the issue would not be part of the trial unless raised by him. It would be wrong to say, however, that a defendant "interjects" the issue of an element of the crime, since that is always part of the criminal case. It is the state that "interjects" it by bringing the prosecution in the first place.

3. Lower courts have adopted this distinction. The Sixth Circuit, for example, has distinguished be-

tween introducing a court-ordered mental examination to prove an element of a crime and to rebut an affirmative defense that the defendant "interject[ed]" into the case. *Davis*, 93 F.3d at 1295 & n.8. Citing the passage from *Estelle* discussed above, the court wrote: "The defendant who claims insanity interjects a new issue into the proceedings on which he or she bears the burden of proof. The privilege is not violated by an examination, because the examination does not concern an element of the crime." *Id.* (citation omitted). By contrast, when "the defendant claims 'diminished capacity' * * * he or she seeks to undercut the government's proof of an element of the offense. Therefore, any compelled examination will necessarily involve self-incrimination." *Id.*

Other courts have come to the same conclusion. *E.g.*, *State* v. *Vosler*, 345 N.W.2d 806, 812-13 (Neb. 1984) ("While * * * a court may have the inherent power to order a psychiatric examination of a defendant who places his sanity in issue * * * such is not the case when a defendant is only attempting to rebut evidence of the intent element of a crime with which he is charged." (citations omitted)). And others have held that there is a "sharp distinction between the use of the results of compulsory psychiatric examinations on the issue of sanity and the use of an incriminating statement made during a compulsory examination on the issue of guilt"—"[t]he former is permissible; the latter is constitutionally forbidden." *Gibson* v. *Zahradnick*, 581 F.2d 75, 78 (4th Cir. 1978); *accord Noggle*, 706 F.2d at 1416 ("Evidence of a defendant's inculpatory statements during a psychiatric examination cannot be admitted to prove guilt."); *Arizona* v. *Tallabas*, 155 Ariz. 321, 325-36 (Ct. App. 1987) (same); *Connecticut* v. *Fair*,

197 Conn. 106, 110-11 (1985) (state can use compelled mental-state examination to rebut affirmative defense but "may not rely" on statements from that examination "to meet its affirmative burden of proving the defendant's guilt"). Indeed, then-Judge Scalia recognized this principle in *Byers*, noting that "[w]here testimony to a defendant's statement during a compelled examination is introduced not on the defendant's sanity but to prove that he committed the criminal act in question, of course a different issue is presented." 740 F.2d at 1111 n.8. Though *Byers* speaks in terms of *actus reus*, the same would apply to proving *mens rea*; both ultimately touch on the issue of guilt.

The bottom line: There is broad agreement that testimony based on a compelled psychiatric examination cannot be used to establish the defendant's guilt. "To hold otherwise would make the privilege against self-incrimination illusory." *Noggle*, 706 F.2d at 1416. In practice, that means the government cannot use evidence from a compelled examination to prove an element of the crime. If this Court ultimately decides some form of implied waiver is appropriate when a defendant introduces expert psychiatric evidence, it should be confined to situations where the defendant does so to prove an affirmative defense.

4. Petitioner emphasizes that in this case the evidence was only used for rebuttal, and not in its "case-in-chief." Pet. Br. 41. That does not matter. Whether evidence is admissible does not vary depending on *when* in the trial the state seeks to introduce it. The crucial point is that the state is using the evidence to prove an element of the crime, rather than to rebut an affirmative defense that the defendant has "inter-

jected" into the case. *Estelle*, 451 U.S. at 465. Suppose, for example, that a defendant called a third-party witness to testify in support of an alibi defense. The state would not be permitted to rebut that testimony with compelled statements of the defendant—or by forcing the defendant to take the stand—just because this "rebuttal" evidence is not part of its case-in-chief.

5. It might be argued that a federal constitutional right should not turn on the state-law distinction between affirmative defenses and elements of the crime. But there is nothing formalistic about a focus on elements. The elements are the "fact[s] necessary to constitute the crime"; they demarcate the conduct the state chooses to punish. *In re Winship*, 397 U.S. at 364. And indeed, this Court has already tied a federal constitutional right to this *exact* state-law distinction: *In re Winship* held that a defendant has a due-process right to have the state prove every element of a crime beyond a reasonable doubt. But under *Patterson*, whether a particular fact falls within the ambit of this right depends upon whether a state chooses to define it as an element or an affirmative defense. 432 U.S. at 210. *See also Smith* v. *United States*, 133 S. Ct. 714, 719 (2013) (due process not violated where defendant bore burden of proving affirmative defense because he was not seeking to negate an element of the crime).

6. If the Court agrees that waiver should only be operative when a defendant has introduced mental-health evidence regarding an affirmative defense, the outcome of this case is clear. Voluntary intoxication is not an affirmative defense under Kansas law. Instead, evidence relating to voluntary intoxication can be "taken into consideration" only to determine

whether a defendant has a "particular intent or state of mind [that] is a necessary element to constitute a particular crime." Kan. Stat. Ann. § 21-5205. Cheever raised voluntary intoxication to negate premeditation, an element of capital murder. *See id.* § 21-3439(a)(5) (2005). Because Cheever only sought to "undercut the government's proof of an element of the offense[,] * * * any compelled examination * * * necessarily involve[d] self-incrimination." *Davis*, 93 F.3d at 1295 n.8. Admitting Welner's testimony therefore violated Cheever's Fifth Amendment rights. Any waiver this Court might choose to imply should not reach so far as to immunize that violation.

III. CHEEVER DID NOT KNOWINGLY WAIVE THE PRIVILEGE GIVEN THE PARAMETERS OF KANSAS LAW.

Finally, this Court could accept Petitioner's waiver argument—or leave the question for another day—and still affirm on a different ground: that Cheever's purported waiver was not "knowing" because Kansas law led him to believe his actions would not waive the privilege.

1. A "waiver of the Fifth Amendment privilege against self-incrimination is valid only if it is made voluntarily, knowingly, and intelligently." *Spring*, 479 U.S. at 566. For such a waiver to be "knowing[ ]," the defendant must voluntarily forgo his privilege "with sufficient awareness of the relevant circumstances and likely consequences." *Brady* v. *United States*, 397 U.S. 742, 748 (1970). Put another way, a defendant can only waive his self-incrimination right if "he knows what he is doing and his choice is made with eyes open." *Adams*, 317 U.S. at 279. That is necessarily a fact-specific inquiry that "depends in each case upon 'the particular facts

and circumstances surrounding the case.' " *Edwards* v. *Arizona*, 451 U.S. 477, 482-483 (1981).

Facts demonstrating waiver were not present here. As the Kansas Supreme Court explained, it is "well established" under Kansas law that "voluntary-intoxication-induced temporary mental incapacity at the time of the crime is not evidence of a mental disease or defect." Pet. App. 32-33 (citing *Kleypas*, 40 P.3d at 162, and *Mason*, 775 P.2d at 181-182). And under Kansas law, the consequence of asserting a defense that is *not* a mental disease or defect is equally well-established: Petitioner cannot introduce the fruits of a compelled psychiatric examination at trial. Pet. App. 31 (citing *Foster*, 910 P.2d at 857, and *Williams*, 884 P.2d at 759-60). Against this background, Cheever did not know that the "act" of introducing Evans' testimony in a Kansas trial-court proceeding "entail[ed] the consequence" of Petitioner using Cheever's compelled statements on rebuttal. *Byers*, 740 F.2d at 1113. Cheever, in other words, did not know he was surrendering his privilege—"an awareness that the doctrine of waiver * * * normally require[s]." *Id.*; *Moran* v. *Burbine*, 475 U.S. 412, 421 (1986) (a waiver "must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it").

2. Petitioner and the United States argue that Cheever nonetheless knew the consequences of his actions given Federal Rule of Criminal Procedure 12.2 and *Buchanan*. Pet. Br. 29, 33-34; U.S. Br. 22-23 n.3. Not so.

a. Recall that Cheever filed a Rule 12.2 notice because, at the time, his case was in federal court. *Supra* at 5. Petitioner argues that when Cheever

filed that notice, his "counsel certainly knew the effect * * * was likely to be a court-ordered mental examination." Pet. Br. 29. Thus, says Petitioner, Cheever "made a deliberate decision * * * inconsistent with maintaining his Fifth Amendment privilege." *Id.*

That argument fails to understand this Court's teachings. Under *Powell* and *Buchanan*, the time of any possible waiver is at trial, when a defendant actually *presents* a mental-state defense supported by expert testimony, not when he gives notice that he plans to do so. *See Powell*, 492 U.S. at 684; *Buchanan*, 483 U.S. at 423; *Battie* v. *Estelle*, 655 F.2d 692, 702 (5th Cir. 1981) ("Submitting to a psychiatric or psychological examination does not itself constitute a waiver of the fifth amendment's protections."). Even the United States agrees. U.S. Br. 21 ("[W]hether the defendant waives the privilege depends on the choices he makes at trial."). Thus the question is not whether Cheever was aware that asserting a mental-state defense in federal court might subject him to a court-ordered mental examination. It is whether Cheever was aware during his subsequent trial in *state* court, when he went ahead and put on expert voluntary-intoxication testimony, that that would allow the prosecution to use the compelled examination against him. Rule 12.2, a federal rule with no application to state-court proceedings, had nothing to say about that latter issue.

b. The United States, for its part, asserts that Cheever "ha[d] ample notice of the consequences of his decision to present such mental health testimony." U.S. Br. 22 n.3. But for that proposition it cites a line from *Buchanan*: "Given our decision in [*Estelle*], * * * counsel was certainly on notice that if

* * * he intended to put on a 'mental status' defense for [the defendant], he would have to anticipate the use of psychological evidence by the prosecution in rebuttal." *Id.* (quoting 483 U.S. at 425). That argument is an anachronism because it relies on *Estelle*—a case that merely *suggested* how the Court might handle compelled examinations—and ignores the rule the Court actually adopted in *Buchanan*: "[I]f a defendant requests [a psychiatric] evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination *that the defendant requested*." *Id.* at 422-23 (emphasis added); *accord Powell*, 492 U.S. at 684 (prosecution can use the examination that "a defendant requests"). Cheever thus may have been on notice that an examination he *requested* would come in under *Buchanan* once he put on mental-state evidence. But that is irrelevant, because he did not request the examination at issue in this case. *See supra* at 5. The binding precedent that informed Cheever and his counsel about what would happen on the facts presented here was Kansas precedent. And it taught that Cheever could put on a voluntary-intoxication defense without opening the door to use of the compelled examination against him.

There is no basis to conclude that Cheever knowingly waived his Fifth Amendment privilege when he put on a voluntary-intoxication defense. Particularly given that this Court "indulge[s] every reasonable presumption against waiver" of constitutional rights, *Barker* v. *Wingo*, 407 U.S. 514, 525 (1972) (quotation marks omitted), it should so hold.

3. Petitioner and the United States object that any reference to Kansas law in the waiver analysis

improperly allows Kansas law to dictate the scope of the Fifth Amendment. Pet. Br. 31-34; U.S. Br. 27-31. They are wrong.

a. Cheever agrees that the "question of waiver of a federally guaranteed constitutional right is * * * a federal question controlled by federal law." *Brookhart* v. *Janis*, 384 U.S. 1, 4 (1966). But the *federal* rule is that a defendant's waiver "must be [a] knowing, intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences." *Brady*, 397 U.S. at 748. And in judging whether a waiver was made with the necessary awareness, state law can be part of the relevant "circumstances" and "consequences."

That is not a novel or controversial position; the application of a federal constitutional standard often hinges on underlying issues of state law. "The federal law which governs the exercise of state authority is obviously interstitial law, assuming the existence of, and depending for its impact on, the underlying bodies of state law." H. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 498 (1954). So, for example, whether a warrantless arrest is lawful under the Fourth Amendment is determined by what conduct a state has chosen to criminalize, *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 354 (2001), and whether a defendant has a right to a jury trial for a specific offense under the Sixth Amendment is determined by what penalty the state has chosen for that offense, *Baldwin* v. *New York*, 399 U.S. 66, 73-74 (1970). This is not to say state law "alter[s] the substantive scope" of the Fourth or Sixth Amendments. U.S. Br. 30. Rather, circumstances of state law can affect the

application of a federal standard to particular defendants.

So too with waiver. Although waiver is a question of federal law, the question whether a particular defendant has waived turns on whether his choice was "knowing" on the facts presented, and those facts can include circumstances of state law. Indeed, this Court said as much in *Halbert* v. *Michigan*, 545 U.S. 605 (2005). The Court held that a defendant could not "elect to forgo" his constitutional right to appointed counsel because Michigan law told him he had no such right. *Id.* at 623-24. In so holding, the Court rejected the dissent's argument that state law was "irrelevant" to the federal waiver analysis. *Id.* at 640 (Thomas, J., dissenting).

Here Cheever's supposed waiver was not "knowing" given the circumstances of Kansas law. Cheever and his counsel correctly understood that under Kansas law, Cheever could introduce Evans' testimony without opening the door to Welner's. Pet. App. 31-33. As a consequence, Cheever could not have knowingly and intelligently consented to the introduction of Welner's testimony.

b. In this regard, the effect of Kansas law on Cheever's waiver is no different than other factual circumstances that can vitiate the knowingness of a Fifth Amendment waiver. For instance, the courts of appeals have held that when an officer tells a defendant there will be no negative repercussions if he waives his Fifth Amendment privilege, that renders the resulting waiver invalid. *See, e.g.*, *United States* v. *Lall*, 607 F.3d 1277, 1283-84 (11th Cir. 2010); *United States* v. *Walton*, 10 F.3d 1024, 1030-31 (3d Cir. 1993). Likewise, where a judge told the defendant that "[t]echnically, [the Government] won't use"

his bail-hearing testimony against him at trial, the resulting waiver was invalid. *United States* v. *Dohm*, 618 F.2d 1169, 1175 (5th Cir. 1980) (en banc). In this case, because Cheever had been given assurances that his decision to mount a mental-state defense would not entail the consequence of his compelled statements being used against him, he could not "knowingly[ ] and intelligently" waive the privilege. *Spring*, 479 U.S. at 566. That those assurances came from state-court rulings, as opposed to the mouth of a police officer or an individual judge, makes no analytical difference.

c. To be sure, a defendant's waiver is not vitiated every time he fails to appreciate every potential consequence of his actions. For instance, this Court has held that a defendant's waiver was valid even though he did not know the precise questions the police would ask. *Spring*, 479 U.S. at 573-575. Similarly, a defendant can validly waive his right to a trial even when he "misapprehended the quality of the State's case." *Brady*, 397 U.S. at 757.

But these precedents only underscore how different the situation is here. In the cases just cited, even though the defendant may have not understood the precise consequences that would flow from his waiver, he understood, in general, what he was giving up. In *Spring*, the defendant understood that if he answered the officers' questions, those answers could be used against him. 479 U.S. at 573-75. And in *Brady*, the defendant understood that his guilty plea would mean the state's case would go untested. 397 U.S. at 757.

Here, by contrast, Cheever was not aware of the most important consequence of introducing mental-state evidence: that it would open Cheever up to

Welner's testimony in rebuttal. That is no minor misunderstanding. Welner's testimony was "extensive and devastating" to Cheever's case. Pet. App. 43. Cheever's lack of awareness of this all-important consequence rendered any supposed waiver of his Fifth Amendment privilege invalid.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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REPLY BRIEF

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STATE OF KANSAS,

Petitioner,

v.

SCOTT D. CHEEVER,

Respondent.

On Writ of Certiorari to the Supreme Court of Kansas

PETITIONER'S REPLY BRIEF

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REPLY BRIEF

This Court's cases establish that, just as a defendant cannot choose to testify and then use the Fifth Amendment as a shield to preclude cross-examination, he cannot present expert testimony about his mental state and use the Fifth Amendment to immunize that testimony from rebuttal. Importantly, whether the Court calls the defendant's tactical decision to present expert testimony a "waiver" or simply defines the Fifth Amendment to prevent distortion of the adversarial process, the bottom line is the same: where a defendant leads, the government must be able to follow.

Cheever's response brief ("Resp.") makes three primary arguments: (1) Dr. Welner's testimony exceeded the proper "scope" of rebuttal regarding whether Cheever's methamphetamine usage affected his mental-state the day of the murder, Resp. 13-25; (2) Cheever's presentation of expert testimony on the effects of his methamphetamine usage (short- and long-term) did not open the door to the State responding with Welner's rebuttal testimony, Resp. 25-48; and (3) Cheever could not have made a "knowing and voluntary" waiver of his privilege because he subjectively believed his Kansas-law "voluntary intoxication" defense would not open the door to Welner's testimony. Resp. 48-55.

Cheever is wrong on all three claims. **First**, the Court need not and should not decide the "scope" argument for three reasons: the Kansas Supreme Court never addressed Cheever's "scope" claim; Cheever argued in his opposition to certiorari that the scope

issue was an independent and adequate state law ground supporting the Kansas court's decision, Cert. Opp. 21-24; and this Court generally does not affirm state court judgments *on state law grounds*. Furthermore, even if the "scope" claim is treated as a federal question and this Court addresses it, all of Welner's testimony was proper rebuttal. His testimony was either essential to a proper psychological evaluation given Cheever's mental-state claims, a direct response to previous testimony by Dr. Evans or Cheever,[1] or both.

Second, Cheever's argument that there is no "waiver" of his Fifth Amendment privilege when he asserts "voluntary intoxication" and presents expert mental-state testimony in support of that defense relies heavily on selective statements in *United States v. Byers*, 740 F.2d 1104 (D.C. Cir. 1984), that question the "waiver" theory. What Cheever ignores, however, is that *Byers* relied on this Court's decisions to *hold* the State was entitled to respond to expert mental-state evidence with evidence from a court-ordered mental examination. Indeed, *Byers* expressly rejects Cheever's main argument: when a defendant argues his mental state "as the reason why he should not be punished for murder, and introduces psychiatric testimony for that

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[1] Although this Court granted certiorari only on the first question presented in the Kansas petition, Cheever's "scope" argument tries to ignore all that occurred at trial before Welner ever testified in rebuttal: (1) Cheever testified at trial before either expert; (2) Cheever's own direct testimony addressed the "outlaw" territory he now complains about; and (3) letters Cheever had written from jail (discussing his "outlaw" lifestyle) already had been introduced into evidence.

purpose, the state must be able to follow where he has led." 740 F.2d at 1113.

Furthermore, to the extent Cheever suggests a "waiver" is limited to affirmative defenses, his argument cannot be squared with this Court's decisions and would be utterly unworkable. Despite Cheever's assertion that he agrees state-law labels do not control the question presented, Resp. 1, he in fact seeks to make the Fifth Amendment's scope depend on state law definitions.

Third, Cheever's argument that his waiver was not "knowing and voluntary" suffers from many of the same flaws as his "no waiver at all" argument. He would make the Fifth Amendment's scope turn on a defendant's subjective knowledge of state law, and in so doing make the analysis depend on the variations in the laws of the States. Furthermore, if the true basis for permitting the State to follow "where the defendant has led" is to prevent distortion of the adversarial process, as this Court's cases and *Byers* indicate, then what matters is what the defendant chooses to do—his objective actions—not what he subjectively believes.

For all of these reasons, Cheever's arguments fail to justify the Kansas Supreme Court's erroneous Fifth Amendment decision.

ARGUMENT

I. CHEEVER'S ARGUMENT THAT DR. WELNER'S TESTIMONY EXCEEDED THE SCOPE OF PROPER REBUTTAL IS NOT ONE THIS COURT SHOULD OR NEED DECIDE AND, IN ANY EVENT, IS MERITLESS.

There is no good reason for this Court to address or consider Cheever's lead argument that Welner's testimony exceeded the scope of proper rebuttal. There are, however, several compelling reasons for the Court not to waste its time and effort on that argument. *See* Part I.A. below. Further, even if the Court were to address the argument, it fails on the merits. *See* Part I.B. below.

A. This Court Need Not And Should Not Decide The "Scope" Issue.

Cheever's argument that Dr. Welner's testimony exceeded the proper scope of rebuttal is a curious way to begin his defense of the decision below. **First**, as Cheever acknowledged in his certiorari opposition (Cert. Opp.), the Kansas Supreme Court never decided this issue: "Mr. Cheever made this argument in the Kansas Supreme Court, but the court did not reach it." Cert. Opp. 21; *see also id.* at 5, 7, 10-11.

Second, contrary to his current assertions that the scope issue is a question of federal law, *see* Resp. 15-16, Cheever argued against granting certiorari by repeatedly characterizing this issue as one of state evidentiary law. *See* Cert. Opp. 20-23. Cheever stated

that "should this Court reverse the decision of the Kansas Supreme Court, Mr. Cheever will seek further review on this issue," *id.* at 23, urging the Court to deny certiorari because the "Kansas Supreme Court has independent and adequate state grounds on which to find reversible error in the admission of Dr. Welner's testimony." *Id.* Only now, in a desperate effort to pull a rabbit out of the hat does Cheever suggest the "scope" issue is actually a federal question. The Court should reject Cheever's merits brief bait-and-switch.

Although this Court has the power to decide *federal* issues raised but not decided below, the Court generally does not use that authority to decide *state law* issues.[2] Ultimately, Cheever's "scope" argument is not properly before the Court.

B. Dr. Welner's Testimony Was Proper Rebuttal Because He Testified Only To Issues Relevant To Cheever's Mental-State Claim And Facts To Which Cheever And Dr. Evans Already Had Testified.

Even if the Court treated Cheever's "scope" argument as raising a federal question and decided to address this claim (which was not addressed below), Cheever's complaints fail on their merits. **First**, Welner engaged in proper psychiatric practice when he

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[2] "If the Court does assume jurisdiction of a case because of a federal question decided in state court, it will generally not proceed further and consider separate questions of state law. *Murdock v. Memphis*, 20 Wall. 590 (1875)." Eugene Gressman, *et al.*, *Supreme Court Practice*, at 226 (9th ed. 2007).

evaluated Cheever's methamphetamine use and its potential effect on Cheever's mental state by considering other causes for Cheever's actions the day of the murder. Furthermore, Welner never said that Cheever had an antisocial personality, nor did he render such a diagnosis. **Second**, Cheever himself, as well as Evans, addressed Cheever's fascination with the "outlaw lifestyle." In fact, letters Cheever had written from jail describing himself as an "outlaw" were in evidence before Welner testified. **Finally**, both Cheever and Evans testified specifically about Cheever's version of events regarding the murder.

1. *The Antisocial Personality Claim Is A Red Herring.*

Cheever's argument that Welner suggested antisocial personality disorder as the cause of Cheever's actions is a mischaracterization. Resp. 22. Welner never testified that Cheever suffered from a personality disorder, nor that such a disorder explained Cheever's actions. What he said was that he "considered" a personality disorder as one of many possible explanations. J.A. 132-33.[3]

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[3] Cheever's brief nowhere quotes Welner as actually stating an opinion that Cheever had an "antisocial personality disorder" or even an "antisocial personality." Instead, Cheever only points to statements by prosecutors that they thought Welner would talk about antisocial personality disorder (the entire discussion between prosecutors and the trial court is at J.A. 89-94), and he then asserts "Welner *began* by explaining that one possible diagnosis he considered was antisocial personality disorder." Resp. Br. 22 (citing J.A. 133) (emphasis added). Welner's testimony, however, begins at J.A. 95, forty pages earlier, and Welner *never*

Welner explained he was asked to "assess the relationship of methamphetamine and Scott Cheever's use of it on January 19th, 2005, to his killing Mathew Samuels." J.A. 111. He framed the question as "here's a person who made a choice, which has now brought him trouble, is that something that only happens to people who use methamphetamine or does it happen under other circumstances ...." J.A. 132.

Accordingly, Welner reasonably considered multiple circumstances that might have affected Cheever's mental state. Cheever apparently suggests that all Welner could do was evaluate the question "was Cheever affected by methamphetamine or not?" without considering what else might have influenced Cheever's actions. But that is an extraordinarily narrow definition of proper "scope" for rebuttal and flies in the face of "judicial common sense." *United States v. Byers*, 740 F.2d 1104, 1113 (D.C. Cir. 1984).

Instead, Welner considered multiple possible explanations for Cheever's actions. J.A. 132-33. Evans opined that Cheever's decisions resulted from using methamphetamine, not other possibilities. J.A. 47-52. Welner responded to Evans' opinion by considering other possible causes, and rejecting methamphetamine usage as *the* cause of Cheever's decision to shoot Sheriff Samuels. Contrary to Cheever's assertions now, Welner's testimony did not include any diagnosis or

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uses the term "antisocial personality disorder" in his testimony. When Welner very briefly discussed personality disorders it was as the fifth of six possible causes he considered for Cheever's behavior. J.A. 131-133.

assertion that Cheever suffered from antisocial personality disorder.

2. *Testimony Regarding Cheever's Fascination With Outlaws Was Proper.*

Cheever's complaint that Welner discussed Cheever's fascination with an "outlaw lifestyle," thereby "smuggl[ing] in character evidence," Resp. 23 is similarly flawed. Cheever's love of "outlaws" was first introduced into the case by Cheever in his direct testimony, when he tried to explain and downplay letters he had written from jail boasting about his exploits and claiming the mantle of "outlaw." (Tr. of Jury Trial, Vol. IV, p. 77-80.)

Furthermore, Evans testified that his evaluation considered Cheever's social history, J.A. 59-60, including Cheever's idolization of and identification with outlaws. J.A. 59-60, 71-72. The prosecutor asked Evans: "In fact, the defendant thought of himself as an outlaw, didn't he?" and Evans answered, "Yes." J.A. 59. Evans also agreed that Cheever idolized outlaws before he ever used methamphetamine, J.A. 60, but he opined Cheever's methamphetamine use, not his social history, was to blame for the murder. J.A. 47-53.

Welner thus was the third witness, not the first, to discuss the "outlaw" evidence. Long before Welner took the witness stand, the jury had heard about Cheever's "outlaw" fascination from both Cheever and Evans. There was no "smuggling" of compelled character evidence; indeed, Cheever first introduced the subject, and Welner's rebuttal was proper.

3. *Cheever And Dr. Evans Both Testified About Cheever's Account Of The Murder.*

Cheever complains that "Welner offered what amounted to a first-person narrative of the shooting from Cheever's perspective," Resp. 21, allegedly forcing Cheever "to testify in detail through the mouthpiece of a state expert." *Id.* at 24. Cheever again fails to acknowledge both that he and his expert had testified at length to Cheever's version of the crime before Welner testified. Even were the merits of this claim before the Court, it is manifest that Welner did not "force" Cheever to tell Cheever's story through Welner. Instead, Welner at most covered ground over which the defendant and his expert already had trod. Furthermore, Welner's rebuttal testimony directly responded to Evans' opinion that Cheever's account of the murder showed that Cheever had no "executive function" when he shot the sheriff and instead acted as a result of methamphetamine-induced paranoia. J.A. 49.

II. WHEN A DEFENDANT INTRODUCES EXPERT MENTAL-STATE EVIDENCE AT TRIAL, THE STATE MAY FOLLOW WHERE THE DEFENDANT HAS LED.

This Court's decisions lead inexorably to the conclusion that where a defendant has led, the State must be permitted to follow. Only such an approach will ensure meaningful adversarial testing of disputed issues before a jury. That long has been the rule when a defendant testifies at trial. The same justifications for holding the Fifth Amendment does not protect a testifying defendant apply with equal force when a

defendant uses expert testimony to support a mental-state defense.

Cheever essentially makes four arguments regarding the Question Presented in the petition: (1) his statements to Dr. Welner were "compelled," and thus cannot be used for any purpose, Resp. 26-28; (2) he should not be required to choose between constitutional rights (self-incrimination and the right to present a defense), making a "waiver" analysis improper, Resp. 27-36; (3) equitable and practical arguments do not support the rule the State seeks, Resp. 37-42; and (4) any "waiver" the Court recognizes should be limited to *affirmative defenses* the defendant interposes at trial. Resp. 42-48. Cheever's arguments fall short on all counts.

A. Introducing Dr. Welner's Testimony Did Not Violate The Fifth Amendment.

1. *Cheever voluntarily participated in the interview with Dr. Welner.*

In arguing that his statements to Welner were compelled and not admissible for any purpose, Cheever ignores his own starring role in the way this case unfolded, including his decision to file a notice in federal court that initiated his mental examination. At bottom, Cheever's argument that his examination was "compelled" and thus cannot be used for any purpose is really an argument that Fed. R. Crim. P. 12.2 is unconstitutional, because every examination under Rule 12.2 is authorized by court order.

When Cheever's counsel filed notice in the federal proceeding that Cheever intended to assert the defense of voluntary intoxication, Pet. App. 69-71, counsel had to have known the notice would result in a court-ordered mental examination. Furthermore, Welner began the interview by informing Cheever that he could discontinue the examination at any time, J.A. 115, and there was no threat of any criminal sanction (such as perjury or contempt charges) if Cheever chose not to cooperate.

Thus, Cheever was not "compelled" to participate in the interview with Welner in the way the Fifth Amendment cases contemplate; he did not face the "cruel trilemma" of self-incrimination, perjury or contempt. *Murphy v. Waterfront Commission*, 378 U.S. 52, 55 (1964). The only consequence of withdrawing from the interview was that Cheever would not be permitted to introduce expert evidence at trial to support his mental-state defense.

Thus, for Fifth Amendment purposes, Cheever's interview with Welner was not "compelled," even if it was court-ordered. Never in any proceeding here has Cheever faced the "cruel trilemma." Cheever was the one who knowingly and voluntarily triggered the court order by filing notice under Fed. R. Crim. P. 12.2. If examinations ordered under Rule 12.2 are "compelled" for Fifth Amendment purposes, then according to Cheever their use by the government is barred for *all purposes*, thus nullifying the very reason for Rule 12.2.

2. *Cheever was not required to make an unconstitutional choice.*

Cheever's tactical decision to use an expert to serve as a mouthpiece for conveying Cheever's account of the crime at trial readily equates to the choice of a defendant to testify on his own behalf. Finding the Fifth Amendment privilege does not apply in this situation "is supported by the long line of Supreme Court precedent holding that the defendant in a criminal or even civil prosecution may not take the stand in his own behalf and then refuse to consent to cross-examination. The justification for this similarly 'coerced' testimony is precisely that which we apply to [expert testimony in support of a mental-state defense]." *United States v. Byers*, 740 F.2d 1104, 1114 (D.C. Cir. 1984). This Court long has recognized the "safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf, and not for those who do." *Raffel v. United States*, 271 U.S. 494, 499 (1926).

Cheever argues that he is being forced to make an unconstitutional choice between his privilege against self-incrimination and his right to present a defense, but "demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination." *Williams v. Florida*, 399 U.S. 78, 84 (1970). Cheever invokes *United States v. Simmons*, 390 U.S. 377 (1968), which held the government could not use in its case-in-chief incriminating statements the defendant made in a pretrial suppression hearing where he unsuccessfully challenged the legality of a

luggage search. *Simmons*, however, provides Cheever no refuge.

In *Simmons*, the Court barred the government from using the evidence in its case-in-chief, but the Court "has not decided whether *Simmons* precludes the use of a defendant's testimony at a suppression hearing to impeach his testimony at trial." *United States v. Salvucci*, 448 U.S. 83, 93-94 (1980). A number of lower courts have held that such evidence is admissible for *impeachment* purposes. *E.g.*, *Gray v. State*, 403 A.2d 853 (Md. 1979); *People v. Sturgis*, 317 N.E.2d 545 (Ill. 1974). *See also Woody v. United States*, 379 F.2d 130, 131–132 (D.C. Cir. 1967) (Burger, J.).

The same considerations that justify admitting such evidence for impeachment apply with equal force to rebuttal. If the Fifth Amendment is not a license to shield a defendant's perjurious statements at trial, it should not be a license to use an expert to present the defendant's untested statements through the expert's testimony about the defendant's mental state. When a defendant provides an interview and information to his expert, he does so with the expectation and hope that his expert will rely upon and necessarily disclose their discussion in the expert's trial testimony. Thus, it is no stretch to hold that a defendant effectively "testifies" at trial through his mental-state expert.

"[T]he core protection afforded by the Self-Incrimination Clause is a prohibition on compelling a criminal defendant to testify against himself at trial." *United States v. Patane*, 542 U.S. 630, 637 (2004) (plurality). That protection is not invaded when a defendant either directly or through his expert *chooses*

to testify. Indeed, the Clause does not provide immunity from adversarial testing of evidence the defendant injects into the trial, and that includes expert mental-state evidence. A contrary conclusion would distort the adversarial process. *See* Part II.A.3 below.

Even accepting for the sake of argument that it is a "fiction" to say "when the defendant introduces his expert's testimony he 'waives' his Fifth Amendment rights," *Byers*, 740 F.2d at 1113, the bottom line remains the same:

> All of these theories are easy game, but it is not sporting to hunt them. The eminent courts that put them forth intended them, we think, not as explanations of the genuine reason for their result, but as devices—no more fictional than many others to be found—for weaving a result demanded on policy grounds unobtrusively into the fabric of law.

Byers, 740 F.2d at 1113. Whether courts have described the reason for this result "as the need to maintain a 'fair state-individual balance,'" "a matter of 'fundamental fairness,'" "or merely a function of 'judicial common sense,'" they "have denied the Fifth Amendment claim primarily because of the unreasonable and debilitating effect it would have upon society's conduct of a fair inquiry into the defendant's culpability." *Id.*

3. *Meaningful rebuttal requires that the State's expert have access to the defendant.*

Cheever asserts that the government can always test and challenge a mental-state defense *without examining the defendant*. Resp. 40-42. But his argument contradicts judicial common sense: "Ordinarily the only effective rebuttal of psychiatric testimony is contradictory opinion testimony; and for that purpose ... [t]he basic tool of psychiatric study remains the personal interview, which requires rapport between the interviewer and the subject." *Byers*, 740 F.2d at 1114. Cheever's cavalier suggestion finds no support in precedent.[4]

In *Estelle v. Smith*, this Court recognized that when a defense expert formulates his opinion by relying on the defendant's own explanation of his mental state, especially recollections involving the crime itself, the defendant's "silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case." 451 U.S. 454, 465 (1981). The Court also pointed to an American Psychiatric Association brief which informed the Court that "absent a defendant's willingness to cooperate ... a psychiatric examination in these circumstances would be meaningless." *Id.* at 456 n. 8. These themes run throughout an unbroken line of the Court's

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[4] Nor does the argument find support in the practices of the mental health professions: "A comprehensive examination on issues of insanity, automatism, or diminished capacity necessitates detailed inquiry into the defendant's thoughts and actions during the time period of the crime." Gary B. Melton, et al., *Psychological Evaluations for the Courts* 4:02(b), at 72 (3d ed. 2007).

decisions involving mental-state issues in criminal cases, decisions in which the Court consistently emphasizes the importance of providing lay juries with the information and opinion testimony necessary to evaluate defendants' mental-state claims.

In *Ake v. Oklahoma*, the Court considered "the pivotal role that psychiatry has come to play in criminal proceedings," 470 U.S. 68, 79 (1985), and recognized that "[p]sychiatry is not, however, an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment, and on likelihood of future dangerousness." *Id.* at 81. Nonetheless, "juries remain the primary factfinders on this issue, and they must resolve differences in opinion within the psychiatric profession on the basis of the evidence offered by each party." *Id.* As a result, *Ake* held that the State in some cases must pay for a psychiatric expert for an indigent defendant, precisely because, by "organizing a defendant's mental history, examination results and behavior, and other information, interpreting it in light of their expertise, and then laying out their investigative and analytic process to the jury, the psychiatrists for each party enable the jury to make its most accurate determination of the truth ...." *Id.*

Buchanan v. Kentucky, 483 U.S. 402 (1987) and *Powell v. Texas*, 492 U.S. 680 (1989), also recognize these principles, as discussed in the State's opening brief, Kansas Br. 20-21, 27, 43, a discussion not repeated here. Cheever, however, seeks to undermine rather than further the fundamental truth-seeking

purpose emphasized in this unbroken line of cases. He proposes to do so by hamstringing the State's ability to put a defendant's mental-state evidence to meaningful adversarial testing. The result of Cheever's proposal would be distortion of the adversarial process, a result the Fifth Amendment does not require.

B. Limiting Rebuttal To Affirmative Defenses Is Contrary To Precedent And Would Make The Fifth Amendment's Scope Turn On State-Law Labels.

Cheever's proposal to limit any "waiver" to the assertion of *affirmative defenses* flies in the face of the Court's cases. Further, it makes no sense in light of the Fifth Amendment's purposes and it ignores the realities of psychiatric testimony. On top of that, Cheever's suggestion would import state-law labels into the analysis, even though he "agrees that state-law labels do not determine the Fifth Amendment's scope." Resp. 1.

Cheever's main argument in support of his distinction is that the federally required proof beyond a reasonable doubt requirement, *In re Winship*, 397 U.S. 358 (1970), applies only to the elements of state-law crimes, not affirmative defenses, so by analogy his Fifth Amendment privilege can be overcome with respect to an affirmative defense, but not for elements of the crime. The analogy is inapt. In the burden of proof situation, the Court takes state substantive criminal law as a given and simply overlays it with a general federal procedural requirement.

In this case, the issue is not a general burden of proof requirement. Rather, the question is what evidence is available to the State to meet its burden. The key is not what "defense" the defendant is raising, but that he is introducing expert testimony to support his mental-state claim, whatever the nature of that claim. There is no reason to resort to state-law labels in determining the Fifth Amendment's scope here.

Nor do this Court's mental-state cases support the distinction Cheever attempts to draw. *Buchanan* speaks in very general terms about a defendant opening the door to rebuttal evidence when "he requests such an evaluation or presents psychiatric evidence ...." 483 U.S. at 422. Likewise, *Estelle* indicates the Fifth Amendment does not protect a defendant who attempts to introduce "psychiatric evidence." 451 U.S. at 468. Neither case suggests rebuttal evidence would be limited to situations involving "an affirmative defense." *Penry v. Johnson*, 532 U.S. 782 (2001), effectively rejects such a distinction, upholding the State's use of evidence from a court-ordered mental examination to rebut a defendant's mental-state argument regarding *a sentencing factor*, not an affirmative defense.[5]

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[5] The only case Respondent really cites in support of his distinction is *United States v. Davis*, 93 F.3d 1286 (6th Cir. 1996), a case that at most opined there might be "serious—and as yet undecided—constitutional questions" if a court ordered a psychiatric examination under Rule 12.2 when the defendant intends to present expert mental-state testimony but not an affirmative defense like insanity. *Id.* at 1295.

Cheever also argues "[w]hether evidence is admissible does not vary depending on when in the trial the state seeks to introduce it." Resp. 46. Such a statement is false, because numerous decisions of this Court hold otherwise. *See, e.g.*, *Kansas v. Ventris*, 556 U.S. 586 (2009) (collecting and summarizing the cases). The Court frequently has drawn a distinction between the government using unlawfully obtained evidence in its case-in-chief (a use that is barred) and using the evidence for rebuttal or impeachment (a permitted use). The Court has done so for the very reasons the distinction is warranted here – to preclude defendants from gaming the adversary process to present the jury with an incomplete, distorted or false picture.

Furthermore, here there is even less reason to bar Welner's rebuttal testimony than the evidence at issue in *Ventris* and similar cases. Here, unlike those cases, there was no unlawful conduct whatsoever in obtaining the evidence Cheever now challenges. Cheever has never claimed that Welner's examination of him was unconstitutional, nor could he do so unless he is asserting that Fed. R. Crim. P 12.2(c) is unconstitutional.[6] That Welner's examination was available to Kansas in this state prosecution may have been a fortuitous result of the procedural history of

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[6] Rule 12.2(c) was amended in 2002 to make clear it authorizes court-ordered examinations in "cases where the defendant is not relying on an insanity defense, but intends to offer expert testimony on the issue of mental condition," Advisory Committee Note (2002), in order to reflect the prevailing view that a "defendant waives the [Fifth Amendment] privilege if the defendant introduces expert testimony on his or her mental condition." *Id.*

Cheever's prosecution, but the State did nothing unlawful to obtain that evidence.

III. CHEEVER'S PROPOSED ANALYSIS FOR DETERMINING WHETHER HE KNOWINGLY WAIVED HIS FIFTH AMENDMENT PRIVILEGE IS UNWORKABLE AND WOULD LEAD TO ARBITRARY RESULTS.

Cheever's final argument is that his waiver was not "knowing and voluntary." Resp. 48-55. That argument suffers from the same legal flaws as his prior arguments, as well as factual flaws based on the record. Most fundamentally, this Court has made clear that when a defendant takes the stand and testifies, his waiver is presumptively (indeed, irrefutably) "knowing and voluntary"; the Court does not inquire into what he subjectively believed. There is no good reason to adopt a completely different analysis here.

Cheever again argues that state-law rules control the Fifth Amendment's scope in determining whether he made a knowing waiver of his rights. Resp. 52-53. But using state law as the baseline for determining waiver will only result in a hopelessly complicated and likely confusing analysis that may well create different results in different states on similar facts, even though the fundamental constitutional question remains the same: when a defendant puts on mental-state evidence, is the State entitled to follow where the defendant has led?

A fundamental flaw in Cheever's argument is his misapprehension of the nature and purpose of the

Court's resort to state law in limited categories of cases. These limited situations ultimately lead back to the proposition that the Court permits the States by and large to define crimes for purposes of applying general rules of federal criminal procedure, such as requirements that each element be proven beyond a reasonable doubt, *In re Winship*, 397 U.S. 358 (1970), or jury trials be available for serious charges. *Baldwin v. New York*, 399 U.S. 66 (1970).

But that is far different than what Cheever proposes here. Cheever is seeking to use state law to create a federal-law shield from adversarial testing of a defense that he affirmatively introduced into a state trial. Kansas law, however, cannot have informed Cheever whether or not presenting Evans' expert testimony waived Cheever's Fifth Amendment privilege – only federal law could tell Cheever that. The Fifth Amendment, not Kansas law, determines the question presented.

Furthermore, even accepting Cheever's flawed analytical approach, his argument fails on the merits here. He repeatedly labels his defense "voluntary intoxication," but his own expert testified at length about the *long-term* effects of methamphetamine use on Cheever, opining that such use could cause *permanent* effects. A Kansas court reasonably could conclude that such evidence effectively raised a "mental disease or defect" defense that permitted a court-ordered mental examination under Kansas law. Even if the Kansas Supreme Court ultimately disagreed with that

assessment, it nonetheless was a plausible argument at the time Cheever decided to present his defense.[7]

The few cases Cheever cites involving defendants misled by state officials about their rights, Resp. 52-53, are inapposite. In each case, an official in a position of power affirmatively and falsely assured the defendant that there would be no adverse consequences from speaking. Here, by contrast, no Kansas official ever suggested to or assured Cheever that raising his mental-state defense would not subject him to the possibility of a court-ordered mental examination or the State's use of such an examination in rebuttal. *Cf. United States v. Lall*, 607 F.3d 1277, 1283-84, 1290 (11th Cir. 2010) (officer told defendant during initial encounter that any information defendant shared would not be used to prosecute him; when defendant sat for a more formal interview, the officer told him he did not need a lawyer and the officer "wasn't going to be charging him with any of this"); *United States v. Walton*, 10 F.3d 1024, 1030-31 (3d Cir. 1993) (officer told defendant—who had attended school with the officer, wrestled in the same program, and who had no reason to know he was under criminal investigation—that "I've known you for a long time. If you want, you can tell us what happened off the cuff.");

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[7] Further, when Cheever testified (before either Evans or Welner), the State asked to use statements Cheever made to Welner to impeach Cheever. The trial court ruled in the State's favor, making clear that Welner was a proper rebuttal witness for Evans as well. (Vol. IV, Tr. 120-121). Even if Cheever believed those rulings were error (and even if they were), the result was Cheever knew in advance that if he put Evans on the stand, the State could respond with Welner in rebuttal.

United States v. Dohm, 618 F.2d 1169, 1175 (5th Cir. 1980) (en banc) (judge told the defendant that any statements made might be used against him, "but I don't know how it can be done. Technically, they won't use it ....").

Nor does *Halbert v. Michigan*, 545 U.S. 605 (2005), help Cheever. In *Halbert*, the question was whether there is a Sixth Amendment right to appointed counsel on appeal from a guilty plea; until *Halbert* was decided, this Court had not recognized such a right. When the state argued the defendant had waived the right in any event, the Court was skeptical a defendant could knowingly waive a right which federal law had not yet recognized. Here, by contrast, Cheever has always known he has a Fifth Amendment privilege against self-incrimination, and there was an unbroken line of precedent (from *Estelle v. Smith* (1980) through *Penry v. Johnson* (2001)), establishing that a defendant who presents expert testimony to support a mental-state defense loses that privilege.[8]

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[8] Moreover, it is not clear that *Halbert* actually relied on state law at all in concluding there was no "waiver." The Court relied on two grounds: (1) the defendant "had no recognized right to appointed appellate counsel that he could elect to forgo," 545 U.S. at 623; and (2) the trial court did not tell the defendant "that in his case there would be no access to appointed counsel." *Id.* at 624. In a footnote the Court suggests state law was irrelevant to the waiver decision. *See id.* at 623 n. 7 ("Assuming, as Justice Thomas suggests, that whether Michigan law conferred on Halbert a postplea right to appointed appellate counsel is irrelevant to whether Halbert waived a federal constitutional right to such counsel," there is no waiver).

Cheever's last-ditch waiver argument is a state-law claim dressed in poorly-fitting federal clothes. If Cheever is correct the trial court misread Kansas law when it admitted Welner's testimony (and he is not), then he must seek a remedy, if available, in the Kansas courts, not here.

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Only by misreading or ignoring an unbroken line of this Court's decisions, by relying on Kansas-law labels to determine the Fifth Amendment's scope, and by arguing to distort the adversarial process can Cheever and his *amici* contend that the Kansas Supreme Court correctly found a Fifth Amendment violation. Instead, where a defendant has led the State must be permitted to follow. No constitutional values are undermined by upholding the State's use of an expert who conducted a court-ordered mental examination of Cheever to rebut the mental-state defense Cheever himself injected into this case. Such values, however, would be undermined by the result Cheever seeks.

CONCLUSION

The State of Kansas respectfully requests that the Kansas Supreme Court's decision be reversed.

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AMICUS CURIAE BRIEF

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BRIEFS

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STATE OF KANSAS, PETITIONER

v.

SCOTT D. CHEEVER

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF KANSAS

BRIEF OF THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a State violates a defendant's Fifth Amendment privilege against compelled self-incrimination when it introduces evidence obtained from a court-ordered mental health evaluation of the defendant to rebut testimony from a defense mental health expert that the defendant lacked the requisite mental state to commit murder.

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In the Supreme Court of the United States

No. 12-609

STATE OF KANSAS, PETITIONER

v.

SCOTT D. CHEEVER

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF KANSAS

BRIEF OF THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether a State violates a defendant's Fifth Amendment privilege against compelled self-incrimination when it introduces evidence obtained from a court-ordered mental health evaluation of the defendant to rebut testimony from a defense mental health expert that the defendant lacked the requisite mental state to commit murder. Because the Fifth Amendment applies to the federal government as well as to the States (through the Fourteenth Amendment), resolution of the question presented will have substantial implications for the conduct of federal criminal trials. The United States therefore has a significant interest in the Court's disposition of this case.

STATEMENT

1. On January 19, 2005, respondent shot and killed Greenwood County Sheriff Matthew Samuels when

Sheriff Samuels attempted to arrest him on an outstanding warrant. Pet. App. 8. The police had received a tip that respondent was present in a home in an area of rural Kansas known for illegal drug activity. *Ibid.*; 1 Tr. 122.[1] At approximately 9:45 a.m., Sheriff Samuels and two other officers went to the home to apprehend respondent. Pet. App. 8; 4 Tr. 59.

Respondent was at the residence. Pet. App. 8. He and several other people had been cooking methamphetamine since the early morning hours. *Ibid.* Sometime between 3 a.m. and 8:30 a.m., respondent injected himself with one shot of methamphetamine. 4 Tr. 58, 140; J.A. 64. When respondent received word that the police were on their way, he and another man went to hide in an upstairs bedroom. Pet. App. 8. Respondent armed himself with a revolver and a semi-automatic pistol. *Id.* at 8-9.

From the upstairs bedroom, respondent heard the police pull up to the house. Pet. App. 9; 4 Tr. 60. He heard the owner of the house answer the door and tell Sheriff Samuels that respondent had already left and that the sheriff could come in and look around. Pet. App. 9; 4 Tr. 61-62. After checking the first floor, Sheriff Samuels noticed a stairway leading upstairs. Pet. App. 9; 2 Tr. 67-68. Sheriff Samuels started up the stairs, calling out respondent's name. Pet. App. 9; 2 Tr. 69-70. Respondent told the other man hiding upstairs to stay put, then stepped out of his hiding place with a cocked and loaded revolver. Pet. App. 9; 4 Tr. 63.

As Sheriff Samuels came up the stairs, respondent shot him in the chest. Pet. App. 9; 4 Tr. 63-64, 106.

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[1] References to the trial transcript are to the volume and page number, so 1 Tr. 122 refers to page 122 of the transcript of the first day of trial.

Respondent went back in the bedroom and told the other man not to escape out the window. Pet. App. 9; 4 Tr. 64. Respondent went back to the stairway, saw Sheriff Samuels lying there, and shot him again. Pet. App. 9; 4 Tr. 65. Respondent then went back into the bedroom and saw that the other man had jumped out the window. *Ibid.*

Two officers came to Sheriff Samuels's aid, and respondent opened fire, nearly hitting one of them. Pet. App. 9; 1 Tr. 110-113; 4 Tr. 106. The officers pulled the sheriff out of the house and attempted CPR, but his wounds were fatal. 1 Tr. 114-119, 140-144; 2 Tr. 15, 22, 24, 31. Backup officers responded to the scene and surrounded the house, but respondent refused to come out. 1 Tr. 146; 2 Tr. 96; 3 Tr. 146-147, 162-164. After a seven-hour standoff, a SWAT team entered the house and rushed up the stairs. 3 Tr. 162-173; 4 Tr. 67-68. Respondent fired multiple rounds at the officers. Pet. App. 9; 3 Tr. 175, 177, 189. The officers returned fire, and respondent surrendered. 3 Tr. 178-179, 182.

The State filed criminal charges against respondent but then dismissed the charges because at that time the death penalty was unavailable as a punishment. See Pet. App. 10; see also *State* v. *Marsh*, 102 P.3d 445, 458 (Kan. 2004) (holding state death penalty statute unconstitutional), rev'd, 548 U.S. 163 (2006).

2. A federal grand jury returned a superseding indictment charging respondent with the murder of Sheriff Samuels, two counts of attempted murder, and various drug and firearm offenses. See Third Superseding Indictment 1-10 (6:05-CR-10050 Docket entry No. 200 (D. Kan. Dec. 14, 2011)).

Respondent filed a notice of his intention to use expert testimony to show that his methamphetamine use

made him unable to form the intent to commit murder. Pet. App. 69-70. Under Federal Rule of Criminal Procedure 12.2, a defendant who plans to introduce expert evidence "relating to a mental disease or defect or any other mental condition" bearing on guilt or capital punishment must provide notice within a certain time period. Fed. R. Crim. P. 12.2(b). When a defendant provides that notice, "the court may, upon the government's motion, order the defendant to be examined" by a mental health expert. Fed. R. Crim. P. 12.2(c)(1)(B).

Consistent with that rule, the district court ordered respondent to undergo a psychiatric examination. Pet. App. 11. Respondent was evaluated by Dr. Michael Welner, a psychiatrist with expertise about the effect of drugs on behavior. *Ibid.*; see J.A. 95-97. Dr. Welner reviewed respondent's medical reports and history and interviewed respondent for five and a half hours. J.A. 112-114.

The case proceeded to trial. During jury selection, defense counsel became unable to proceed, so the district court suspended the case. Pet. App. 10-11. In the meantime, this Court held that the Kansas death penalty statute is constitutional. See *Kansas* v. *Marsh*, 548 U.S. 163 (2006). Federal prosecutors dismissed the case without prejudice to enable respondent to be tried in state court. Pet. App. 11.

3. Respondent was charged in state court with the capital murder of Sheriff Samuels, attempted capital murder of four law enforcement officers, and several drug and firearm offenses. Pet. App. 6; see 06CR198 Compl. 1-5 (Greenwood Cnty. D. Ct. Oct. 25, 2006).

Respondent's defense at trial was that his methamphetamine use made him incapable of forming the intent to commit murder. Pet. App. 10. Respondent testified

in his own defense. He acknowledged that he had killed Sheriff Samuels and shot at the other officers, 4 Tr. 63-65, 84-85, but blamed his actions on his use of methamphetamine, *id.* at 5-41, 58-60, 90, 138.

The defense then presented the testimony of Dr. Roswell Lee Evans, Jr., a psychiatric pharmacist. Pet. App. 10. Dr. Evans testified about the short-term and long-term effects of methamphetamine use on the brain. *Id.* at 12-13. He stated that when a person ingests methamphetamine, he experiences an immediate "rush" that lasts up to half an hour and the drug remains in his system for 13 to 14 hours. *Id.* at 12; J.A. 38-40. Dr. Evans explained that, over time, methamphetamine use can "change the structure of the brain" and impair a person's ability to exercise judgment and make rational decisions. J.A. 40-43, 46. Based on his examination of respondent, Dr. Evans concluded that respondent had developed "neurotoxicity," meaning that his brain had been altered by long-term methamphetamine use, and he was "intoxicated by meth at the time of the sheriff's shooting," both of which "affect[ed] his ability to plan, to premeditate this crime." J.A. 47-51.

The State called Dr. Welner—the psychiatrist who had examined respondent in the federal case—as a rebuttal witness. Respondent objected, contending that because his defense was "voluntary intoxication" and not a "mental disease or defect," and Kansas rules of criminal procedure allow a trial court to order a mental examination only for a "mental disease or defect" defense, Dr. Welner was not a proper rebuttal witness. J.A. 88-90; see Kan. Stat. Ann. § 22-3219. The State replied that respondent had put his own mental state in issue by presenting Dr. Evans's testimony, and Dr. Welner's testimony "directly rebut[ted]" that testimony. J.A. 89-

90. The court agreed and permitted Dr. Welner to testify. J.A. 92.

Based on his examination of respondent, Dr. Welner concluded that respondent could form the intent to commit murder on the day of the crimes. J.A. 144. Dr. Welner observed that respondent had injected methamphetamine "on a number of occasions" without "becom[ing] homicidally violent," and he concluded that at the time of the crimes, respondent was "aware of his surroundings" and had the "ability to control his actions." J.A. 135-137, 141. Dr. Welner gave examples of respondent's conscious decisionmaking, including his decisions to hide upstairs, to stay quiet to evade detection, to wait to fire until Sheriff Samuels entered the stairwell, to direct the activities of the other man hiding upstairs, and to shoot Sheriff Samuels a second time. J.A. 136-141.

The jury convicted respondent on all charges and respondent was sentenced to death. Pet. App. 6.

4. The Kansas Supreme Court reversed respondent's convictions for murder and attempted murder. Pet. App. 1-68. The Kansas Supreme Court held that Dr. Welner's testimony had violated respondent's Fifth Amendment privilege against compelled self-incrimination. *Id.* at 7.

The Kansas Supreme Court noted that if a defendant "place[s] his or her mental state in issue" by "present[ing] evidence at trial that he or she lacked the requisite criminal intent due to a mental disease or defect," that operates as a "waiver" of the Fifth Amendment privilege, and the State may "use [a court-ordered psychiatric] examination against the defendant." Pet. App. 24, 31. But the court found no such waiver here because respondent claimed a "temporary mental incapacity due

to voluntary intoxication," not a "mental disease or defect," and Kansas law authorizes a court-ordered psychiatric examination only for a "mental disease or defect" defense. *Id.* at 28-31, 34-35.

SUMMARY OF ARGUMENT

The Fifth Amendment privilege against compelled self-incrimination does not bar the prosecution from using testimony from a court-ordered mental health evaluation to rebut a defense expert's testimony about the defendant's mental state. The Fifth Amendment provides a defendant with a right not to testify at his own trial. But it does not permit the defendant to place his own one-sided version of events before the jury free from rebuttal. When a defendant provides his version of events—either through his own testimony or through a mental health expert—the defendant's conduct waives the Fifth Amendment privilege as appropriate to permit the prosecution to challenge that evidence. Denying the prosecution the chance to respond would distort the truth-seeking process and undermine the integrity of the criminal trial.

A. The core protection of the Fifth Amendment is a prohibition on the use of compelled testimony from the defendant to establish his guilt at trial. The defendant has a right to choose not to testify at his own trial, and if he invokes that right, the government and the court may not comment on his silence, and the jury may not draw an adverse inference from his silence. But if the defendant takes the opposite approach and presents a defense that includes his own statements, his defense is subject to adversarial testing. That is because the defendant, through his conduct, has relinquished the protection of the privilege and subjected his evidence to the ordinary working of the adversary system.

This Court has long recognized that a defendant who testifies in his own defense may not claim the privilege to avoid adversarial testing. Instead, his act of testifying opens the door to cross-examination and to impeachment using his own prior statements. This Court has termed the defendant's decision to take the stand a waiver: the defendant has a choice whether to testify at trial, and when he "offer[s] himself as a witness" he "waive[s]" the privilege against compelled self-incrimination. *Raffel* v. *United States*, 271 U.S. 494, 496-497 (1926).

B. The same principle applies when a defendant affirmatively introduces evidence of his own mental health at trial. In a series of decisions starting with *Estelle* v. *Smith*, 451 U.S. 454 (1981), this Court considered Fifth Amendment challenges to the prosecution's use of evidence from a court-ordered mental health examination of the defendant. Whether such evidence may be used by the prosecution, the Court explained, depends on whether the defendant had presented evidence that placed his own mental state in issue. In *Smith*, the defendant had not done so, and the privilege remained intact. But the Court recognized that it would be a "different situation" if the defendant had affirmatively introduced expert testimony about his mental state. *Id.* at 472. In that instance, the Court stated, a court-ordered mental health evaluation may be the only way the State can meaningfully respond to the defendant's evidence. *Id.* at 465.

In cases following *Smith*, when the defendant had placed his mental state in issue by presenting testimony from a mental health expert, the Court confirmed that the prosecution could use evidence from a court-ordered mental health examination to rebut the defendant's

evidence. See *Powell* v. *Texas*, 492 U.S. 680 (1989) (per curiam); *Buchanan* v. *Kentucky*, 483 U.S. 402 (1987). The Court reasoned that a defendant "waive[s] his Fifth Amendment privilege by raising a mental-status defense." *Powell*, 492 U.S. at 685.

Accordingly, just as a defendant cannot testify at trial and then claim the protection of the Fifth Amendment against relevant cross-examination, he cannot place his mental state in issue through the testimony of an expert and then claim that the Fifth Amendment immunizes his expert from rebuttal. To hold otherwise would unjustifiably impede the truth-seeking function of the criminal trial.

C. Permitting the prosecution to rebut the defendant's expert testimony with evidence from a court-ordered mental health evaluation is consistent with the purposes of the Fifth Amendment privilege. The Amendment protects the defendant's free choice. Only if the defendant himself introduces mental state evidence may the prosecution rebut the defense evidence using evidence from an examination of the defendant. The defendant's choice whether to put his mental state in issue, like his choice whether to testify, safeguards constitutional values against compelling the defendant to furnish testimonial evidence used to convict and punish him.

A contrary rule would be untenable. Allowing a defendant to introduce the testimony of his own mental health expert free from challenge would skew the truth-seeking function of the trial. Testimony from a mental health expert may carry great weight with the jury, and if the prosecution is not afforded a meaningful opportunity to challenge the defense expert, the jury would hear a one-sided story.

This Court has relied on the same logic to permit impeachment of a testifying defendant using evidence obtained in violation of constitutional guarantees. In that context, the evidence may be used for impeachment in order to preserve the integrity of the trial. The same principle of evenhandedness applies when the defendant puts his mental state in issue through expert testimony: the prosecution must have a fair opportunity to respond.

D. The Kansas Supreme Court erred in holding that the Fifth Amendment precluded the expert who performed the court-ordered examination from testifying in this case. Respondent argued that he lacked the necessary mental state to commit the crime, and he introduced his own expert's testimony about the effects of methamphetamine use to support that defense. Based on his examination of respondent, the defense expert concluded that respondent was unable to form the necessary intent to commit murder. But the expert who performed the court-ordered examination in federal court had reached a different conclusion. Once respondent introduced his own expert's testimony in the state trial, the State was entitled to present testimony from the expert who performed the court-ordered examination in rebuttal.

The Kansas Supreme Court incorrectly believed that whether respondent waived his Fifth Amendment privilege depended on state law. The court reasoned that because state law authorizes trial courts to order an examination only of a defendant raising a mental disease or defect defense, and respondent did not raise that type of defense, admission of the evidence from the examination ordered in federal court violated the Fifth Amendment. But whether the Fifth Amendment permits the State's use of that evidence in rebuttal is a federal ques-

tion controlled by federal law. It does not matter how state law characterizes respondent's mental-state defense or whether a state court may order a mental health examination when the defendant presents a certain defense. What matters is that respondent had "place[d] his mental status at issue" (*Buchanan*, 483 U.S. at 425 n.21) by introducing his own expert's testimony. The judgment of the Kansas Supreme Court should be reversed.

ARGUMENT

THE FIFTH AMENDMENT DOES NOT BAR THE GOVERNMENT FROM PRESENTING EVIDENCE FROM A COURT-ORDERED MENTAL HEALTH EVALUATION OF THE DEFENDANT TO REBUT TESTIMONY FROM A DEFENSE MENTAL HEALTH EXPERT THAT THE DEFENDANT LACKED THE MENTAL STATE NECESSARY TO COMMIT THE CRIME

In this case, respondent put on an expert witness to testify about respondent's mental health. Based on his conversations with respondent, the expert testified that respondent was unable to form the necessary intent to commit murder. The State attempted to rebut that testimony by presenting its own expert, a psychiatrist who had previously examined respondent pursuant to a federal court order and concluded that respondent was able to form the necessary intent. The question here is whether, after respondent presented his own mental health expert's testimony to establish that he lacked the necessary mental state, he may use the Fifth Amendment to shield that testimony from rebuttal by the government's expert.

The answer is no. The Fifth Amendment does not give a criminal defendant the right to present his own version of events to the jury free from challenge. When

a defendant offers his own testimony, he waives the Fifth Amendment privilege to permit appropriate cross-examination. Similarly, when he presents a mental-state defense through an expert who examined him, the prosecution must have the opportunity to respond with a prior court-ordered examination of him. A contrary rule would be unfair to the prosecution and would leave the jury with a one-sided version of events, substantially impeding the jury's search for the truth.

A. A Defendant Who Testifies At Trial Waives His Fifth Amendment Privilege And His Testimony Is Subject To Adversarial Testing

1. The Fifth Amendment provides, in pertinent part, that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V; see U.S. Const. Amend. XIV. The "core protection" of the Self-Incrimination Clause is "a prohibition on compelling a criminal defendant to testify against himself at trial." *United States* v. *Patane*, 542 U.S. 630, 637 (2004) (plurality opinion); see *id.* at 645 (Kennedy, J., concurring in the judgment).

The privilege against compelled self-incrimination was in part a "response to certain historical practices, such as ecclesiastical inquisitions and the proceedings of the Star Chamber," *Andresen* v. *Maryland*, 427 U.S. 463, 470 (1976), where an accused was placed under oath and then subjected to the "cruel trilemma of self-accusation, perjury or contempt," *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 55 (1964). The Self-Incrimination Clause reflects the judgment that "the prosecution should [not] be free to build up a criminal case, in whole or in part, with the assistance of enforced disclosures by the accused." *Doe* v. *United States*, 487 U.S. 201, 212

(1988) (brackets in original; citation and emphasis omitted).

Accordingly, the Self-Incrimination Clause provides the defendant with a right not to testify (or even to be sworn as a witness) at his own trial. *Griffin* v. *California*, 380 U.S. 609, 613 (1965); see *Wilson* v. *United States*, 149 U.S. 60, 66 (1893). The Fifth Amendment privilege generally is not self-executing; if an individual "desires the protection of the privilege, he must claim it." *United States* v. *Monia*, 317 U.S. 424, 427 (1943). If a defendant invokes the privilege by declining to take the stand, the prosecution and the judge may not comment on the defendant's failure to testify, see *Griffin*, 380 U.S. at 614, and, at the defendant's request, the judge must instruct the jury not to draw an adverse inference from the defendant's silence, *Carter* v. *Kentucky*, 450 U.S. 288, 300 (1981).

2. At the same time, a criminal defendant "has the right to take the witness stand and to testify in his or her own defense." *Rock* v. *Arkansas*, 483 U.S. 44, 49 (1987). This was not the case at common law and in the American colonies, where a defendant was presumed incompetent to testify because of his stake in the outcome. See *Portuondo* v. *Agard*, 529 U.S. 61, 65-66 (2000); *Ferguson* v. *Georgia*, 365 U.S. 570, 574-577 (1961). But as this Court has explained, several constitutional provisions reflect the view that a criminal defendant may not be deprived of his liberty without having an opportunity "to be heard and to offer testimony" on his own behalf. *Rock*, 483 U.S. at 51-53.

If a criminal defendant elects to testify at trial, his testimony is subject to adversarial testing. "When a defendant assumes the role of a witness, the rules that generally apply to other witnesses—rules that serve the

truth-seeking function of the trial—are generally applicable to him as well." *Agard*, 529 U.S. at 69 (brackets and citation omitted). "It is well established that a witness, in a single proceeding, may not testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about the details." *Mitchell* v. *United States*, 526 U.S. 314, 321 (1999). That principle applies equally to a testifying defendant: "It has long been held that a defendant who takes the stand in his own behalf cannot then claim the privilege on matters reasonably related to the subject matter of his direct examination." *McGautha* v. *California*, 402 U.S. 183, 215 (1971) (citing cases).

Although a defendant may refuse to testify at all, he "has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts." *Fitzpatrick* v. *United States*, 178 U.S. 304, 315 (1900). The government also may impeach the defendant by confronting him with his prior convictions, his own prior inconsistent statements, or even his own pre-arrest silence. See, *e.g.*, *Jenkins* v. *Anderson*, 447 U.S. 231, 237-238 (1980); *McGautha*, 402 U.S. at 215; *Harris* v. *New York*, 401 U.S. 222, 225 (1971); *Spencer* v. *Texas*, 385 U.S. 554, 561 & n.7 (1967); see also pp. 25-26, *infra*.

Accordingly, it has "always been" understood that the Self-Incrimination Clause protects a defendant when he chooses to remain silent, but not when he chooses to speak, in that once the defendant testifies, his testimony is subject to adversarial testing. *Brown* v. *Walker*, 161 U.S. 591, 597 (1896); see, *e.g.*, *Agard*, 529 U.S. at 69; *Mitchell*, 526 U.S. at 321; *Ohio Adult Parole Auth.* v. *Woodard*, 523 U.S. 272, 286 (1998); *McGautha*, 402 U.S. at 215; *Raffel* v. *United States*, 271 U.S. 494, 496-497

(1926); *Fitzpatrick*, 178 U.S. at 315; see also, *e.g.*, 8 John Henry Wigmore, *Evidence in Trials at Common Law* § 2276, at 459, 461-462 (John T. McNaughton rev., 1961).

3. The longstanding rule that a criminal defendant who chooses to testify is subject to adversarial testing is premised on the view that the defendant waives his Fifth Amendment privilege by testifying. The defendant "has the choice" whether to testify "after weighing the advantage of the privilege against self-incrimination against the advantage of putting forward his version of the facts and his reliability as a witness." *Brown* v. *United States*, 356 U.S. 148, 155 (1958). If the defendant claims the privilege, "the matter is at an end." *Johnson* v. *United States*, 318 U.S.189, 196 (1943) (citation omitted). But if the defendant "offer[s] himself as a witness," he "waive[s]" the privilege and is subject to cross-examination and impeachment. *Raffel*, 271 U.S. at 496-497. By testifying, the defendant has "cast aside the cloak of immunity." *Id.* at 497. See also, *e.g.*, *Mitchell*, 526 U.S. at 321 ("The privilege is waived for the matters to which the witness testifies."); *Johnson*, 318 U.S. at 195 (defendant's "voluntary offer of testimony" is a "waiver") (citation omitted); *Brown*, 161 U.S. at 597 (defendant "waive[s] his privilege" by testifying).

The purposes of the privilege against compelled self-incrimination do not extend to shielding a defendant who has chosen to testify at trial against cross-examination. "The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do." *Raffel*, 271 U.S. at 499. Once a defendant chooses to testify, "[t]he interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations deter-

mining the scope and limits of the privilege against self-incrimination." *Brown*, 356 U.S. at 156. "[N]o unfairness" inheres in allowing cross-examination of a defendant who chooses to testify. *Mitchell*, 526 U.S. at 322. The Fifth Amendment does not provide a defendant with "an immunity from cross-examination on the matters he himself has put in dispute." *Brown*, 356 U.S. at 155-156.

A contrary rule would severely hamper the administration of justice. The "central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986). A testifying defendant, like any other witness, is "under an obligation to speak truthfully and accurately," and the prosecution may "utilize the traditional truth-testing devices of the adversary process" to ensure that he fulfills that obligation. *Harris*, 401 U.S. at 225. Cross-examination of a testifying defendant "enhance[s] the reliability of the criminal process" and "advances the truth-finding function of the criminal trial." *Jenkins*, 447 U.S. at 238; see *Agard*, 529 U.S. at 70 (the "adversary system * * * reposes judgment of the credibility of all witnesses in the jury") (citation omitted).

Permitting a defendant to testify and then claim the protection of the Fifth Amendment would transform the privilege from "a humane safeguard against judicially coerced self-disclosure" into an "invitation to mutilate the truth." *Brown*, 356 U.S. at 156. If a defendant could "pick and choose what aspects of a particular subject to discuss," it would "diminish[] the integrity of the factual inquiry" and "open the way to distortion of facts." *Mitchell*, 526 U.S. at 322 (citation omitted). It would also deprive the prosecution of a meaningful opportunity

to challenge the defendant's testimony. This Court has recognized, in the context of the Fifth Amendment privilege, that "it is important that both the defendant and the prosecutor have the opportunity to meet fairly the evidence and arguments of one another." *United States* v. *Robinson*, 485 U.S. 25, 33 (1988); see *Murphy*, 378 U.S. at 55 (one purpose underlying the privilege is a "sense of fair play"). For all of these reasons, this Court has long held that a defendant who chooses to testify has lost the protection of the Fifth Amendment privilege.

B. A Defendant Who Presents Expert Testimony About His Own Mental State Likewise Waives His Fifth Amendment Privilege

1. In a series of cases, this Court has recognized that, just as a criminal defendant may not present his own testimony and then claim a Fifth Amendment shield from cross-examination, the defendant may not present an expert to testify about his mental state and then claim a Fifth Amendment immunity from rebuttal.

The Court first considered a Fifth Amendment challenge to the prosecution's use of mental health evidence in *Estelle* v. *Smith*, 451 U.S. 454 (1981). In that case, the trial court ordered the defendant to undergo a competency exam, and it was not clear that the court had provided any notice to defense counsel. *Id.* at 456-460. The prosecution introduced testimony from the psychiatrist who conducted that examination to prove future dangerousness at a capital sentencing proceeding. *Id.* at 470-471. This Court concluded that the prosecution's use of this testimony violated the defendant's Fifth Amendment privilege against compelled self-incrimination and Sixth Amendment right to counsel. *Id.* at 468-469. Because the expert "drew his conclusions largely from [the defendant's] account of the crime," "[t]he Fifth Amend-

ment privilege * * * [wa]s directly involved." *Id.* at 464-465. The Court held that "[a] criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding." *Id.* at 468.

Critical to the Court's reasoning was that the defendant had not placed his mental state in issue through expert testimony. *Smith*, 451 U.S. at 466. The Court recognized that "a different situation arises" when the defendant does put his own mental state in issue. *Id.* at 472; see *id.* at 457 n.1. In that instance, the Court suggested, the prosecution may have to present evidence derived from a court-ordered mental health evaluation, because "[w]hen a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case." *Id.* at 465. "Accordingly," the Court noted, "several Courts of Appeals have held that, under such circumstances, a defendant can be required to submit to a sanity examination conducted by the prosecution's psychiatrist." *Ibid.*

2. In *Buchanan* v. *Kentucky*, 483 U.S. 402 (1987), the Court confronted the situation it had anticipated in *Smith*. A defendant on trial for murder attempted to establish a defense of "extreme emotional disturbance" by having a social worker introduce the results of psychological examinations of the defendant performed while the defendant was in custody. *Id.* at 408-409 & n.9. In response, the prosecution had the social worker read a report from another examination, ordered by the court at the joint request of the prosecution and defense

while the defendant was in custody. *Id.* at 410-411. The defendant contended that the prosecution's use of the mental health report violated his privilege against compelled self-incrimination. *Id.* at 411-412.

This Court rejected that argument, holding that the defendant in those circumstances had "no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution." *Buchanan*, 483 U.S. at 423. The Court observed that its holding in *Smith* "logically leads to [the] proposition" that "if a defendant requests [a psychiatric] examination or presents psychiatric evidence," the "prosecution may rebut this presentation" with evidence from the court-ordered examination. *Id.* at 422. The Court then explained that the "entire defense strategy" was to establish "the 'mental status' defense of extreme emotional disturbance" by presenting psychological evaluations of the defendant, and the prosecution "could not respond to this defense unless it presented other psychological evidence." *Id.* at 423.

3. The Court reiterated that a defendant may not use the Fifth Amendment privilege to insulate a mental-state defense from rebuttal in *Powell* v. *Texas*, 492 U.S. 680 (1989) (per curiam). *Powell* concerned Fifth and Sixth Amendment challenges to the prosecution's use of a psychiatric examination of the defendant to rebut his insanity defense. *Id.* at 683. The Court found a violation of the right to counsel because that right had attached and counsel had not been given notice of the mental health examination. *Id.* at 685-686. But the Court rejected the defendant's Fifth Amendment challenge on the ground that the defendant had placed his own mental state in issue by presenting the results of his psychiatric examination at trial. *Id.* at 683-684.

Relying on its decisions in *Smith* and *Buchanan*, the Court concluded that a defendant who introduces his own mental health evaluation to prove a mental-state defense has no valid Fifth Amendment objection to the prosecution's use of a court-ordered examination of the defendant in rebuttal. *Powell*, 492 U.S. at 684-685. The Court noted, as it had in *Smith*, that a contrary rule would "deprive the State of the only effective means it has" to rebut the mental-state defense. *Ibid.* (quoting *Smith*, 451 U.S. at 465). And the Court characterized its decision in *Buchanan* as holding that the defendant had "waived his Fifth Amendment privilege by raising a mental-status defense." *Id.* at 685. The Court thus reaffirmed that a defendant who presents mental health testimony has no Fifth Amendment shield against rebuttal of that testimony using evidence from a court-ordered examination.[2]

4. This Court's decisions in *Smith*, *Buchanan*, and *Powell* establish that a defendant may not present expert evidence based on his own mental health examination free from rebuttal by the prosecution's expert witness. Just as a defendant who testifies at trial "cast[s]

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[2] In *Penry* v. *Johnson*, 532 U.S. 782 (2001), the defendant presented expert testimony to establish that he was mentally retarded, and the prosecution responded by introducing a court-ordered psychiatric report relied on by that expert. *Id.* at 788. On federal habeas corpus review, the Court held that the state court's rejection of the defendant's Fifth Amendment challenge to the prosecution's use of the report did not conflict with clearly established federal law. *Id.* at 794-796. The Court noted that the only time it had found a Fifth Amendment violation based on the prosecution's use of mental health evidence was in *Smith*, and it found *Smith* distinguishable because Smith "had not placed his mental condition at issue," whereas Penry had "made his mental status a central issue" during his trial. *Id.* at 794.

aside the cloak of [Fifth Amendment] immunity," *Raffel*, 271 U.S. at 497, a defendant who presents a mental health expert's opinion based on interviews of the defendant has "waived" any Fifth Amendment objection to the prosecution's use of a court-ordered mental health examination in rebuttal, *Powell*, 492 U.S. at 684. In both contexts, whether the defendant waives the privilege depends on the choices he makes at trial.

C. Permitting The Prosecution To Rebut The Defendant's Expert Testimony About His Mental Health Respects The Fifth Amendment Privilege While Preventing Distortion Of The Trial And Unfairness To The Prosecution

1. The waiver principle recognized in this Court's cases appropriately respects the purposes of the Fifth Amendment. The government may not compel a defendant to make statements and then introduce those statements in its case in chief at trial. For the same reasons, the government may not compel a defendant to speak with a mental health professional and then use the expert's testimony affirmatively to establish guilt or the appropriate sentence when the defendant presents no expert mental health evidence of his own. See *Smith*, 451 U.S. at 462. The constitutional problem is the prosecution's use of the mental health examination "as affirmative evidence" rather than rebuttal evidence, *id.* at 466; such use violates the principle that the government cannot meet its burden of proof "by the simple, cruel expedient of forcing [the necessary evidence] from [the defendant's] own lips," *id.* at 462 (citation omitted).

But when a defendant uses his own statements to a mental health expert to establish his mental state, the Fifth Amendment privilege no longer shields him from the prosecution's similar use of mental health examination evidence. A defendant "waive[s]" "[t]he immunity

from giving testimony * * * by offering himself as a witness," *Raffel*, 271 U.S. at 496, and he equally "waive[s]" the Fifth Amendment privilege "by introducing psychiatric testimony in support of" a mental-state defense, *Powell*, 492 U.S. at 683. Once a defendant presents his own statements at trial—whether through his own testimony or through a mental health expert—he has abandoned the protection of the Fifth Amendment privilege, and his statements are subject to adversarial testing. *Smith*, 451 U.S. at 465. The Fifth Amendment does not permit a defendant to present his own statements through another witness and then claim that the privilege immunizes that witness from rebuttal.[3]

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[3] The waiver of Fifth Amendment rights occurs because the defendant has taken actions inconsistent with the privilege by presenting expert testimony about his own mental state. A defendant may waive constitutional rights through conduct inconsistent with those rights. See, *e.g.*, *Berghuis* v. *Thompkins*, 130 S. Ct. 2250, 2261-2262 (2010) (finding an "implied waiver" of a defendant's *Miranda* rights when accused makes statements after receiving warnings); *United States* v. *Goldberg*, 67 F.3d 1092, 1098-1100 (3d Cir. 1995) (defendant's repeated firing of court-appointed attorneys "may be treated as * * * a waiver of the right to counsel"). The defendant has ample notice of the consequences of his decision to present such mental health testimony. See *Buchanan*, 483 U.S. at 425 ("Given our decision in *Smith*, * * * counsel was certainly on notice that if * * * he intended to put on a 'mental status' defense for [the defendant], he would have to anticipate the use of psychological evidence by the prosecution in rebuttal."). Moreover, the Sixth Amendment guarantees that defense counsel will have notice of any mental health examination ordered by a court after the right to counsel has attached. See *Smith*, 451 U.S. at 469-471. This is accordingly not a context in which the defendant himself must affirmatively state his knowing and intelligent waiver of rights. Instead, the decision to present such expert evidence is one to be made in consultation with counsel as a matter of trial strategy. See *Florida* v. *Nixon*, 543 U.S. 175, 187-189 (2004). In any event, whether the Court relies on waiver principles,

The choice whether to present affirmative mental health evidence and risk rebuttal or to forgo use of such evidence and retain the privilege is a constitutionally permissible one. "The criminal process, like the rest of the legal system, is replete with situations requiring the making of difficult judgments as to which course to follow." *McGautha*, 402 U.S. at 213 (internal quotation marks and citation omitted). "[E]very person accused of crime is under some pressure to testify, lest the jury, despite carefully framed instructions, draw an unfavorable inference from his silence." *Raffel*, 271 U.S. at 499. Yet this Court has recognized that whether to testify at trial is a "choice of litigation tactics," not an impermissible burden on the defendant's Fifth Amendment privilege. *Jenkins*, 447 U.S. at 238. The same is true with respect to the choice to put on expert testimony based on an examination of the defendant. The defendant may "put[] forward his version of the facts" through the testimony of his expert witness, but if he does, he "cannot reasonably claim" an immunity from rebuttal because "he has himself put [his mental state] in dispute." *Brown*, 356 U.S. at 155-156.

2. Permitting rebuttal of a defense mental health expert's testimony is necessary to preserve the integrity of the criminal trial. Society has a weighty interest in "prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth." *Alderman* v. *United States*, 394 U.S. 165, 175 (1969). Interpreting the Fifth

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on the Fifth Amendment's purposes, or on the need to protect the integrity of the trial process, the result is the same: a defendant who places his mental health in issue through the testimony of an expert who examined him has no Fifth Amendment right to exclude the testimony of an expert who conducted a court-ordered examination.

Amendment to prohibit the prosecution's use of a court-ordered mental health examination to rebut a defendant's mental-state defense would undermine the jury's search for truth. Without its own expert, the prosecution could not meaningfully challenge the testimony of the defendant's expert. See *United States* v. *Byers*, 740 F.2d 1104, 1114 (D.C. Cir. 1984) (en banc) (Scalia, J.) ("Ordinarily the only effective rebuttal of psychiatric opinion testimony is contradictory opinion testimony."). And jurors, who "generally have no training in psychiatric matters," would be deprived of evidence necessary to "make [the] most accurate determination of the truth on the issue before them." *Ake* v. *Oklahoma*, 470 U.S. 68, 81 (1985).

The prosecution's rebuttal evidence is especially important because juries may place great weight on the defense expert's testimony. "[P]sychiatric testimony * * * is clothed with a scientific authority that often carries great weight with lay juries." *Satterwhite* v. *Texas*, 486 U.S. 249, 264 (1988) (Marshall, J., concurring in part and concurring in the judgment). "Unlike lay witnesses, who can merely describe symptoms they believe might be relevant to the defendant's mental state," psychiatrists can "identify the elusive and often deceptive symptoms of" a mental impairment and can "tell the jury why their observations are relevant." *Ake*, 470 U.S. at 80 (internal quotation marks and citation omitted). As this Court recognized in *Smith*, permitting a defendant to introduce his own mental health evaluation and then claim the protection of the Fifth Amendment privilege could "deprive the State of the only effective means" it has to dispute a mental-state defense. 451 U.S. at 465; see, *e.g.*, *Buchanan*, 483 U.S. at 423; *Schneider* v. *Lynaugh*, 835 F.2d 570, 576 (5th Cir.), cert.

denied, 488 U.S. 831 (1988). Put simply, "the state must be able to follow where [the defendant] has led." *Byers*, 740 F.3d at 1113.

3. The principle that a defendant who introduces expert testimony of his own mental state opens the door to rebuttal is reinforced by this Court's cases addressing the permissible impeachment of a testifying defendant. This Court has recognized in numerous contexts that once a defendant testifies, he opens the door to impeachment using evidence that would not otherwise be available to the prosecution. For example, the prosecution may use evidence obtained from an illegal search or seizure to impeach a defendant's testimony at trial, because permitting the defendant to present false testimony and use the Fourth Amendment as his shield would pervert the truth-seeking process. *United States* v. *Havens*, 446 U.S. 620, 622, 626-627 (1980); *Walder* v. *United States*, 347 U.S. 62, 64-65 (1954). Evidence obtained in violation of the Sixth Amendment right to counsel likewise may be used for impeachment purposes, on the theory that the defendant's "perjurious statements" should not be "allow[ed] * * * to go unchallenged." *Kansas* v. *Ventris*, 556 U.S. 586, 594 (2009).

The Court also has permitted impeachment of a testifying defendant with statements obtained in violation of *Miranda*. See *Harris*, 401 U.S. at 223-226. Although "*Miranda* bar[s] the prosecution from making its case with statements of an accused made while in custody prior to having or effectively waiving counsel," the evidence is not "barred for all purposes"; instead, the prosecution may use that evidence to impeach the defendant so that "[t]he shield provided by *Miranda*" is not "perverted into a license to use perjury by way of a defense,

free from the risk of confrontation with prior inconsistent utterances." *Id.* at 223-226; see *Oregon* v. *Haas*, 420 U.S. 714, 723 (1975).

Although this case concerns rebuttal of an expert mental health witness rather than impeachment of the defendant himself, and the prosecution may use the evidence substantively as opposed to only for impeachment purposes, the prosecution's evidence is allowed in both contexts for similar reasons. The government is not allowed to use the evidence in its case in chief because such use would violate the Constitution, see *Ventris*, 556 U.S. at 590; *Smith*, 451 U.S. at 468; *Harris*, 401 U.S. at 224, or because exclusion is necessary to remedy an existing constitutional violation, see *Walder*, 347 U.S. at 64-65. But once the defendant has presented his own statements—through his own testimony or that of his expert—precluding the government from challenging those statements would unjustifiably skew the trial. Compare *Brown*, 356 U.S. at 156, with *Harris*, 401 U.S. at 225. In order to safeguard the fairness of the trial, a defendant cannot use the Fifth Amendment to put his version of events before the jury without being subject to meaningful adversarial testing by evidence from a court-ordered mental health examination.[4]

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[4] Only in limited circumstances has the Court barred all uses of a defendant's statements at trial. Evidence obtained by coercion in violation of the Due Process Clause may not be used for any purpose. See *Mincey* v. *Arizona*, 437 U.S. 385, 398-399 (1978). Similarly, the Fifth Amendment forbids any use at trial of grand jury testimony compelled under a grant of immunity. See *New Jersey* v. *Portash*, 440 U.S. 450, 458-459 (1979); see also *Ventris*, 556 U.S. at 590.

Neither situation is implicated here. Court-ordered mental health examinations do not involve the types of coercive actions that implicate the Due Process Clause, such as use of force or threats to overbear the defendant's will. See, *e.g.*, *Mincey*, 437 U.S. at 401-402.

D. A Defendant's Waiver Of The Fifth Amendment Privilege Does Not Depend On State Law

1. Under the principles set out by this Court, the answer in this case is clear: respondent put his mental state in issue at trial through the testimony of a mental health expert who had examined him, and so the prosecution could use evidence from respondent's court-ordered mental examination in rebuttal. Respondent provided notice in his federal trial that he planned to present an expert to testify that he lacked the requisite

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Moreover, use of evidence from a mental health examination in rebuttal is fundamentally unlike the use of immunized grand jury testimony. In an immunity order, "the witness is told to talk or face the government's coercive sanctions, notably, a conviction for contempt," *Portash*, 440 U.S. at 459; here, a defendant faces the prospect of rebuttal using evidence from a court-ordered examination only when he first puts his mental health in issue, and giving the defendant the choice between "silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination." *Williams* v. *Florida*, 399 U.S. 78, 84 (1970).

Indeed, whatever compulsion is involved in a court order requiring a defendant to undergo a mental health examination is substantially lessened by the defendant's ability to choose whether to trigger the examination in the first place and whether to make the results of the examination available at trial. A court-ordered mental health examination generally occurs because the defendant notifies the court that he intends to present a mental-state defense. See Fed. R. Crim. P. 12.2(a) and (c)(1). And once the examination occurs, the defendant controls whether evidence from it will be admitted at trial: If the defendant presents expert testimony about his own mental state, then evidence from the examination may be used in rebuttal. See *Smith*, 451 U.S. at 465; see also Fed. R. Crim. P. 12.2(c)(4). The defendant never faces the "cruel trilemma of self-accusation, perjury or contempt," *Murphy*, 378 U.S. at 55. If he refuses to participate in a court-ordered mental health examination, the consequence is the exclusion of expert evidence supporting his mental-state defense at trial. See Fed. R. Crim. P. 12.2(d)(1).

mental state to commit murder, Pet. App. 69-70, and the district court ordered respondent to undergo a psychiatric examination, see Fed. R. Crim. P. 12.2(c)(1). No constitutional error occurred in the court's decision to order the examination. Such an examination cannot itself violate the privilege against compelled self-incrimination because the privilege is a "trial right of criminal defendants" and "a constitutional violation occurs only at trial" (for example, if such an examination is admitted in the government's case in chief). *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 264 (1990); see *Chavez* v. *Martinez*, 538 U.S. 760, 766-768 (2003) (plurality opinion).

The prosecution did not present any expert testimony about respondent's mental state in its case in chief in respondent's state trial. Instead, respondent put his mental health in issue by testifying himself about his methamphetamine use, 4 Tr. 5-41, 58-60, 90, 138, and then by presenting the testimony of Dr. Evans to provide an opinion about the effects of that methamphetamine use, J.A. 47-51. Once Dr. Evans presented this opinion, which was based on his interview with respondent, J.A. 35, it was appropriate for the State to present Dr. Welner's opinion about respondent's mental state, which he had developed based on the court-ordered evaluation of respondent, J.A. 113-114.

Dr. Welner's testimony directly rebutted Dr. Evans's testimony. Both experts considered the frequency and extent of respondent's methamphetamine use and addressed the effect it had on his behavior in general and his ability to control his actions on the day of the crimes. Compare J.A. 40-44, 46-52 (Dr. Evans) with J.A. 124-126, 134-141 (Dr. Welner). Dr. Welner reviewed Dr.

Evans's report and considered Dr. Evans's conclusions in preparing his own testimony. J.A. 113-114.[5]

Dr. Welner's testimony was critical evidence for the State in attempting to respond to the defense. The "entire defense strategy" was to claim that respondent lacked the necessary intent to commit murder, *Buchanan*, 483 U.S. at 423, and expert opinion testimony from a psychiatrist who had examined respondent was the "only effective means" of challenging the defense expert's testimony on this point, *Smith*, 451 U.S. at 465. Accordingly, the Fifth Amendment privilege does not preclude the prosecution's use of Dr. Welner's testimony to rebut the testimony of Dr. Evans.[6]

2. The Kansas Supreme Court erred in holding that the Fifth Amendment prohibited Dr. Welner from testifying at respondent's trial. That court correctly recognized, based on this Court's decisions, that when the defendant presents a mental health expert's testimony in support of a mental-state defense, he has "waive[d]

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[5] The parties dispute whether Dr. Evans reviewed Dr. Welner's report in formulating his own opinion. Compare Pet. Br. 39 n.5 with Br. in Opp. 19-20; see 5 Tr. 61 (defense concession); Pet. App. 38 (Kansas Supreme Court's view). There is no need to resolve this question because respondent's presentation of Dr. Evans's testimony is itself sufficient to permit the State to present Dr. Welner's testimony in rebuttal.

[6] Respondent argued below that Dr. Welner's testimony exceeded the scope of rebuttal because Dr. Welner provided alternative reasons for respondent's behavior. See Resp. Kan. S. Ct. Br. 120-130, available at 2010 WL 7196356. No question about the proper scope of rebuttal testimony is before this Court, however, because respondent conceded in his brief in opposition that the Kansas Supreme Court did not address the scope question and characterized that question as a state-law issue appropriately left for remand. See Br. in Opp. 5, 7, 10-11.

[his] Fifth Amendment privilege" and "the State may use [a] court-ordered examination for the limited purpose of rebutting" that defense. Pet. App. 31; see *id.* at 27-28. But the court found no waiver here because the only type of mental-state defense for which the trial court could order a mental health examination under state law was a "mental disease or defect defense," and respondent put forth a different defense—"a temporary mental incapacity due to voluntary intoxication." *Id.* at 28, 32, 34-35; see Br. in Opp. 12-18 (embracing this reasoning).

The Kansas Supreme Court erred in using state law to decide the federal constitutional question. "The question of a waiver of a federally guaranteed constitutional right is * * * a federal question controlled by federal law." *Brookhart* v. *Janis*, 384 U.S. 1, 4 (1966). The scope of the Fifth Amendment privilege does not depend upon whether the defendant is in state or federal court. See *Malloy* v. *Hogan*, 378 U.S. 1, 10-11 (1964). In either case, what matters is whether the defendant has introduced testimony of a mental health expert who has examined the defendant and formed an opinion based on that examination. *Powell*, 492 U.S. at 684-685. State law may provide its own restrictions on the use of certain evidence at trial, but it may not alter the substantive scope of federal constitutional rights. See, *e.g.*, *Virginia* v. *Moore*, 553 U.S. 164, 171-172 (2008); *Arkansas* v. *Sullivan*, 532 U.S. 769, 772 (2001) (per curiam). A violation of state law is not a violation of the federal Constitution as such. See, *e.g.*, *Wilson* v. *Corcoran*, 131 S. Ct. 13, 16 (2010) (per curiam).

Contrary to the Kansas Supreme Court's view (Pet. App. 32), it does not matter for Fifth Amendment purposes whether state law characterizes respondent's

defense as a "mental capacity defense." This Court has considered use of court-ordered mental health examinations to rebut a variety of mental-state defenses, and it has never viewed the label placed on the defense by state law as determinative of the Fifth Amendment question. For example, the defendant in *Buchanan* attempted to establish an "extreme emotional disturbance" defense, which did not require proof of any permanent mental infirmity. 483 U.S. at 408 & n.8. The Court upheld the prosecution's use of a court-ordered psychiatric examination to rebut the defendant's mental state expert, not based on the specific type of the defense, but because the defendant had "place[d] his mental status at issue." *Id.* at 425 n.21; see also *Powell*, 492 U.S. at 683 (insanity defense).

The Fifth Amendment analysis likewise does not turn on whether state rules of criminal procedure permit the prosecution to obtain a court-ordered examination of the defendant. If state law does not provide such a procedure, then the prosecution may not have any material available to use for rebuttal. For example, the Kansas Supreme Court determined that Kansas trial courts may order a mental health examination only when the defendant plans to argue that he "lacked the mental state required" "as a result of a mental disease or defect" (Kan. Stat. Ann. § 22-3219) and it concluded that respondent did not present such a defense in this case. Pet. App. 34-35. If a court ordered a mental health examination in violation of state law, then a defendant could pursue a state-law remedy. But the defendant would not have a federal constitutional objection to the prosecution's use of the examination to rebut his own mental health expert's testimony.

CONCLUSION

The judgment of the Supreme Court of Kansas should be reversed.

Respectfully submitted.

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MAY 2013

AMICUS CURIAE BRIEF

--CORD
ND
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No. 12-609

IN THE

Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

SCOTT D. CHEEVER,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

BRIEF FOR AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF KANSAS AND WESTERN MISSOURI IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union (ACLU) is a nationwide, non-profit, nonpartisan organization with approximately 500,000 members dedicated to the principles of liberty and equality embedded in the Constitution. The ACLU of Kansas and Western Missouri is an affiliate. Founded more than 90 years ago, the ACLU has participated in numerous cases before this Court involving the scope and application of constitutional rights, both as direct counsel and as amicus curiae.

Through its Capital Punishment Project (CPP), the ACLU represents individuals charged with capital offenses as well as those who have been convicted and sentenced to death. CPP's staff are trained and experienced in screening individuals for symptoms of mental or psychological disorders or impairments, and they regularly train other attorneys and mitigation specialists in developing, understanding, and litigating mental-health evidence. This case is of central concern to the ACLU and CPP because of its potential consequences for the use of mental-health evidence in capital sentencing.

SUMMARY OF ARGUMENT

Although this case concerns the presentation of expert psychological testimony at a trial's guilt phase, the Court's decision could have important consequences for sentencing in capital cases. In particular, a decision

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[1] Letters consenting to the filing of amicus briefs have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel made a monetary contribution to the preparation or submission of this brief.

holding that an unrestricted Fifth Amendment waiver results any time a defendant offers mental-state evidence would significantly erode capital defendants' Eighth Amendment rights. The Eighth Amendment guarantees capital defendants the right to present a broad range of mitigating evidence at sentencing. This Court has repeatedly recognized the importance of that right to ensuring the reliability of death sentences because it enables jurors to render a reasoned moral judgment as to whether a sentence of death is appropriate in light of all the circumstances. *See, e.g.*, *Penry* v. *Lynaugh*, 492 U.S. 302, 319 (1989) (*Penry I*).

The right to present mitigating evidence includes the right to present expert testimony about the defendant's mental health or abilities that would render him less morally culpable for the crime. Recognizing an unrestricted waiver of the Fifth Amendment privilege against self-incrimination whenever a defendant presents such evidence would jeopardize a capital defendant's Eighth Amendment right to present mental-state evidence in mitigation. A capital defendant wishing to present such evidence could do so only at the expense of a substantial intrusion on his Fifth Amendment right in the form of a prosecution expert using the defendant's own statements from a compelled examination to show the jury that he has an incurable and violent personality disorder. Such a tradeoff impermissibly burdens the exercise of both rights, and this Court has long recognized that it is constitutionally "intolerable" to predicate the exercise of one constitutional right on the forced relinquishment of another. *See Simmons* v. *United States*, 390 U.S. 377, 394 (1968). The resulting harm therefore counsels against holding that a capital defendant's introduction of expert psychological testimony in mitigation constitutes a waiver of his Fifth

Amendment right against self-incrimination, in addition to the reasons Respondent gives (at 25-42), with which amici agree. To the extent this Court does recognize a waiver in such a circumstance, any waiver should arise only where a defendant offers expert mental-health testimony based on an in-person examination, and the scope of such a waiver should be carefully limited to the scope of the defendant's statements on which the expert relied.

Practical experience suggests that the harm associated with broad, unrestricted waivers of Fifth Amendment rights in such circumstances is not merely theoretical. Far from promoting reliability of verdicts, as the State contends (at 24-28), the forced tradeoff of rights can and does undercut the reliability of capital sentencing determinations, particularly where the scope of the Fifth Amendment waiver is not carefully policed. Faced with the prospect that exercising their right to offer mitigation evidence would subject them to wide-ranging, intrusive mental examinations conducted by "agent[s] of the State," *Estelle* v. *Smith*, 451 U.S. 454, 467 (1981), some capital defendants may choose to forgo presenting expert mental-state testimony altogether. Such a decision keeps the jury from hearing evidence crucial to rendering the constitutionally required "reasoned moral response to the defendant's background, character, and crime." *Penry I*, 492 U.S. at 319. Conversely, where capital defendants do choose to present mental-health evidence in support of mitigation, they are often subjected to unchecked, State-compelled examinations into their mental processes—and resulting alternative "diagnoses" of "evil" character or personality disorders based on questionable science—that go far beyond the scope of any of the mitigating evidence initially offered. Such testimony,

in addition to being limitless in scope and of dubious reliability, is highly prejudicial to the jury's verdict. The exercise of the Eighth Amendment right to present mitigating evidence should not be conditioned on opening the door to such testimony.

ARGUMENT

I. THE SCOPE OF ANY WAIVER OF A CAPITAL DEFENDANT'S FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION SHOULD BE NARROWLY DEFINED TO AVOID INFRINGING HIS EIGHTH AMENDMENT RIGHTS

A. Capital Defendants Have A Right Under The Eighth Amendment To Present A Broad Range Of Mitigating Evidence At Sentencing

1. This Court has long recognized "the principle that punishment should be directly related to the personal culpability of the criminal defendant," particularly where the defendant is facing death. *Penry* v. *Lynaugh*, 492 U.S. 302, 319 (1989) (*Penry I*). In furtherance of that principle, the Eighth Amendment guarantees that a defendant facing a possible death sentence has the right both to introduce mitigating evidence on his behalf and to have a sentencer consider and give effect to that evidence when it counsels in favor of a punishment less than death. *See Abdul-Kabir* v. *Quarterman*, 550 U.S. 233, 251 n.13 (2007); *Jurek* v. *Texas*, 428 U.S. 262, 271 (1976) (plurality).

This Eighth Amendment right to present mitigation evidence ensures that capital sentencing is both individualized and reliable—a need that is heightened in capital cases due to the uniquely severe and irrevocable nature of the punishment. *See Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978) (plurality); *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976) (plurality). It is only

when the jury is able to consider the full range of a defendant's mitigating evidence and "express[] its reasoned moral response to that evidence in rendering its sentencing decision that we can be sure that the jury has treated the defendant as a uniquely individual human being and has made a reliable determination that death is the appropriate sentence." *Penry* v. *Johnson*, 532 U.S. 782, 797 (2001) (*Penry II*) (internal quotation marks, citations, and brackets omitted); *see also Penry I*, 492 U.S. at 317, 328 (Eighth Amendment "mandates an individualized assessment of the appropriateness of the death penalty" and insists upon "'reliability in the determination that death is the appropriate punishment in a specific case'"). Precluding a sentencer "from giving independent mitigating weight to" such evidence, conversely, creates an impermissible "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Lockett*, 438 U.S. at 605.

2. For these reasons, the range of mitigation evidence a capital defendant may introduce at sentencing is broad and may include expert psychological testimony about a defendant's social history and mental health. "[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Penry I*, 492 U.S. at 319.

In applying the Eighth Amendment, this Court has consistently rejected attempts to limit a defendant's ability to present mitigation evidence. *See Payne* v. *Tennessee*, 501 U.S. 808, 822 (1991) ("[V]irtually no limits are placed on the relevant mitigating evidence a cap-

ital defendant may introduce concerning his own circumstances."). For example, the Court has rejected heightened relevance requirements for the admission of mitigating evidence, explaining that the relevance threshold for such evidence in the sentencing phase of a capital case is, as with any other evidence, a low one: Any evidence that is "relevant to mitigation even if it [does] not *excuse* the defendant's conduct" must be admissible and considered by the jury. *McKoy* v. *North Carolina*, 494 U.S. 433, 441 (1990); *see also Skipper* v. *South Carolina*, 476 U.S. 1, 4 (1986) ("[T]he sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.'"). Similarly, the Court has clarified that evidence offered in mitigation need not have caused or had any other "nexus" to the crime. *Tennard* v. *Dretke*, 542 U.S. 274, 287 (2004). Rather, any evidence tending to show that a defendant should be held less morally culpable should be admitted. *Id.*; *see also Mills* v. *Maryland*, 486 U.S. 367, 375 (1988) ("Because the [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence," any restriction on the defendant's right to present mitigating evidence violates the Eighth Amendment.).[2]

Relatedly, the Court has also rejected attempts to limit a jury's ability to consider and give effect to mitigation evidence. For example, when several States responded to the decision in *Furman* v. *Georgia*, 408 U.S.

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[2] Indeed, given the importance of mitigation evidence in capital sentencing, the Court has also recognized that an unreasonable failure by defense counsel to investigate or present mitigation evidence at sentencing constitutes deficient performance in violation of the Sixth Amendment. *See Wiggins* v. *Smith*, 539 U.S. 510, 533, 538 (2003); *Strickland* v. *Washington*, 466 U.S. 668, 691 (1984).

238 (1972), by enacting mandatory death-penalty statutes, the Court uniformly invalidated those measures. *See, e.g.*, *Woodson*, 428 U.S. at 303-305; *Roberts* v. *Louisiana*, 428 U.S. 325, 333-334 (1976) (plurality). In doing so, a plurality of this Court emphasized that "in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process inflicting the penalty of death." *Woodson*, 428 U.S. at 304; *see also Jurek*, 428 U.S. at 271 ("A jury must be allowed to consider on the basis of *all* relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." (emphasis added)); *Gregg* v. *Georgia*, 428 U.S. 153 (1976) (plurality) ("[I]t is constitutionally required that the sentencing authority have information sufficient to enable it to consider the character and individual circumstances of a defendant prior to imposition of a death sentence."). Consistent with those cases, the Court has since made clear that only sentencing schemes that allow the jury to consider and give full effect to all of the defendant's mitigating evidence will survive Eighth Amendment scrutiny. *See Penry II*, 532 U.S. at 797; *Boyde* v. *California*, 494 U.S. 370, 377-378 (1990); *Penry I*, 492 U.S. at 320-328; *Eddings* v. *Oklahoma*, 455 U.S. 104, 110-115 (1982); *Lockett*, 438 U.S. at 604-605.

B. Exercise Of The Eighth Amendment Right Should Not Be Conditioned On An Unrestricted Relinquishment Of Fifth Amendment Rights

Without narrowly defined limits, the State's position in this case—that a defendant's presentation of any

mental-state evidence in defense or mitigation broadly waives the right against self-incrimination—would impermissibly burden the Eighth Amendment right to present all relevant mitigation evidence to a jury during capital sentencing. Under the State's view, a capital defendant would face an impossible choice: either give up the Eighth Amendment right to present mitigating evidence at sentencing, or subject himself to an unrestricted intrusion on his Fifth Amendment privilege against self-incrimination. But this Court has long recognized that it is constitutionally intolerable to predicate the exercise of one constitutional right on the forced relinquishment of another. *See Simmons* v. *United States*, 390 U.S. 377, 394 (1968). Therefore, to minimize the harm to both rights, the scope of any Fifth Amendment waiver should be narrowly tailored to the scope of the defendant's own statements that formed the basis of his expert's mental-health testimony.

1. In several cases, this Court has rejected the notion that the exercise of one constitutional right may be conditioned on the substantial impairment of another. In *Simmons*, the Court held that a criminal defendant cannot be compelled to give up his Fifth Amendment privilege against self-incrimination in order to assert his Fourth Amendment right against illegal searches and seizures. 390 U.S. at 390-394. The defendant in that case moved to suppress a suitcase that he contended had been illegally seized—a piece of evidence that, if shown to have been in his possession, would have tied him to the crime. *Id.* at 391. To establish standing for his suppression motion, however, the defendant was required to testify that the suitcase was his. *Id.* Once his suppression motion was denied, the prosecution used that testimony against the defendant at trial, and he was convicted.

This Court held that the defendant's testimony from the suppression hearing should not have been admissible at trial to establish guilt. *Simmons*, 390 U.S. at 392-393. The Court's analysis rested on the concern that allowing a defendant's suppression-hearing testimony to be used against him at trial would chill the defendant's exercise of his Fourth Amendment rights:

> It seems obvious that a defendant who knows that his testimony may be admissible against him at trial will sometimes be deterred from presenting the testimonial proof of standing necessary to assert a Fourth Amendment claim. ... In such circumstances, a defendant with a substantial claim for the exclusion of evidence may conclude that the admission of the evidence, together with the Government's proof linking it to him, is preferable to risking the admission of his own testimony connecting himself with the seized evidence.

Id. at 393.

In addition to this deterrence concern, the Court also recognized that a rule allowing the admission of suppression-hearing testimony "imposes a condition of a kind to which this Court has always been peculiarly sensitive. For a defendant who wishes to [assert his Fourth Amendment rights] must do so at the risk that the words which he utters may later be used to incriminate him." *Simmons*, 390 U.S. at 393. For those reasons, the Court found it "intolerable that one constitutional right should have to be surrendered in order to assert another." *Id.* at 394; *see also Howard* v. *Walker*, 406 F.3d 114, 129 (2d Cir. 2005) (trial court "offered ... constitutionally-impermissible choice" when it forced defendant "to choose between his Sixth Amendment

right" of cross-examination and "his Sixth Amendment right to exclude [an] unreliable hearsay confession of a co-conspirator"); *Hunt* v. *Mitchell*, 261 F.3d 575, 584 (6th Cir. 2001) (trial court impermissibly imposed "element of coerced choice decried ... in *Simmons*" when it forced defendant to choose between his Sixth Amendment right to counsel and his state statutory right to a speedy trial).[3]

Similarly, in *Lefkowitz* v. *Cunningham*, 431 U.S. 801 (1977), this Court invalidated a New York law that required holders of public office to waive their privilege against self-incrimination if subpoenaed by a grand jury. Under the law, an officeholder who refused to waive that immunity would be immediately removed from office and barred from holding any other office for five years. *Id.* at 802. This Court held that the New York law violated the Fifth Amendment by coercing a waiver through imposition of substantial penalties. *Id.* at 806. That coercion was achieved in part by requiring the officeholder "to forfeit one constitutionally protected right"—*i.e.*, the "[First Amendment] right to partic-

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[3] In *McGautha* v. *California*, 402 U.S. 183, 211 (1971) (cited at U.S. Br. 14, 23), the Court reaffirmed *Simmons*'s holding that the prosecution's use at trial of the defendant's suppression-hearing testimony "created an unacceptable risk of deterring" the exercise of the Fourth Amendment right. The Court also clarified that, although the Constitution does not "always forbid" the forced choice between one constitutional right and another, the Constitution does forbid that choice when "compelling the election impairs to an appreciable extent any of the policies behind the rights involved." *Id.* at 213. Thus, under *Simmons* and *McGautha*, any waiver that results from a defendant's presentation of expert mental-health testimony must be narrowly limited to avoid deterring or substantially impairing the defendant's exercise of his constitutional rights.

ipate in private, voluntary political associations"—as the price for exercising another." *Id.* at 807-808.

Those decisions are consistent with the broader principle that the government may not "burden[] the Constitution's enumerated rights by coercively withholding benefits from those who exercise them." *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2565 (2013). That principle applies even where those benefits are wholly discretionary, rather than constitutionally mandated. *See, e.g., Agency for Int'l Dev.* v. *Alliance for Open Soc'y Int'l*, 133 S. Ct. 2321, 2328 (2013); *Perry* v. *Sinderman*, 408 U.S. 593, 597 (1972); *Board of County Comm'rs* v. *Umbehr*, 518 U.S. 668, 674-675 (1996). Where, as here, the "benefit" that is threatened is not a discretionary act of legislative grace but instead a benefit "afforded by another provision of the Bill of Rights," the prohibition on unconstitutional conditions should apply with even greater force. *Simmons*, 390 U.S. at 394.

2. These cases counsel against recognizing a waiver in this circumstance—or, at the very least, in favor of narrowly defining the scope of any such waiver when a defendant presents expert mental-health testimony. Under the rule advocated by the State in this case, as in *Simmons* and *Lefkowitz*, capital defendants would be required to give up entirely one constitutional right in order to exercise another: They must either submit to a broad, unrestricted infringement on their Fifth Amendment privilege against self-incrimination in order to exercise their Eighth Amendment right to present mitigating mental-state evidence, or forgo the introduction of vital mitigation evidence to protect themselves from damning, wide-ranging psychological evaluations based on their own compelled statements.

This "choice" impermissibly burdens the exercise of both rights. And it can have dire consequences for the reliability of capital sentencing verdicts. To preserve his Fifth Amendment right against self-incrimination, a capital defendant is not merely forced to forgo a right to *present* evidence; he is forced to forgo his right to a "reliable determination that death is the appropriate sentence." *Penry II*, 532 U.S. at 797. In a case where the ultimate penalty is irreversible, the government should not be entitled to coerce a defendant into giving up his right to a reliable sentencing process. *See Lockett*, 438 U.S. at 604; *Woodson*, 428 U.S. at 303-304.

II. In Practice, Prosecutors' Use Of Expert Psychiatric Testimony Purportedly Based On In-Person Evaluations Of The Defendant Undermines The Reliability Of Capital Verdicts

The State asserts (at 24-28) that finding a broad waiver of the Fifth Amendment right against self-incrimination when a defendant introduces mental-state evidence is necessary to promote the reliability of verdicts. Experience suggests, however, that permitting prosecutors to introduce expert testimony purportedly based on the government's own psychiatric evaluation of the defendant whenever a capital defendant introduces mental-state evidence would undermine the reliability of capital verdicts.

When exercising the Eighth Amendment right subjects a defendant to a wide-ranging, intrusive probing into his mental processes by state agents, a capital defendant can be discouraged from offering such evidence at all, thereby depriving the jury of information vital to a reasoned moral sentencing decision. *See Penry I*, 492 U.S. at 319. And for defendants who proceed with the presentation of mitigation evidence at the expense of

their Fifth Amendment right, a failure to enforce appropriate limits on the scope of any Fifth Amendment waiver can result in examinations and testimony that go far beyond the evidence presented in mitigation (or the defendant's statements on which that evidence is based). In those cases, prosecution experts often render opinions based on the defendant's own statements that bolster the State's affirmative case through alternative "diagnoses" based on questionable science. Such evidence is not only unreliable, but it is highly prejudicial and can unduly influence juries to vote in favor of death.

A. The Prospect Of Opening The Door To Psychiatric Testimony By Prosecution Experts That Is Not Carefully Limited In Scope Can Chill Defendants' Exercise Of Their Eighth Amendment Rights At Sentencing

A holding that a defendant's introduction of expert mental-health testimony effects an unrestricted waiver of a defendant's Fifth Amendment privilege against self-incrimination can create a barrier to the presentation of mitigating evidence during capital sentencing by chilling defendants' exercise of their Eighth Amendment rights. *See Simmons*, 390 U.S. at 394. In a capital case, "the decision to be made regarding [a] psychiatric evaluation is 'literally a life or death matter[.]'" *Estelle* v. *Smith*, 451 U.S. 454, 471 (1981); *see Satterwhite* v. *Texas*, 486 U.S. 249, 254 (1988). As the Court has recognized, this decision requires that a capital defendant and his counsel have "'a knowledge of what other evidence is available, of the particular psychiatrist's biases and predilections, [and] of possible alternative strategies at the sentencing hearing.'" *Smith*, 451 U.S. at 471 (alteration in original). But if a capital

defendant must fear wide-ranging expert testimony based on a compelled "fishing expedition," *United States* v. *Williams*, 731 F. Supp. 2d 1012, 1018 (D. Haw. 2010), the moment he or any of his witnesses say anything at sentencing that touches on his mental condition, the "alternative strateg[y]" will be clear and preordained: Do not testify; do not call experts.

The example of capital defendant Donald Fell bears this out. *See United States* v. *Fell*, No. 2:01-cr-12-01, 2006 U.S. Dist. LEXIS 24707, at *8-15, 22-28 (D. Vt. Apr. 24, 2006) (*Fell I*); *United States* v. *Fell*, ___ F. Supp. 2d ____, 2013 WL 1953320 (D. Vt. 2013) (*Fell II*). Before trial, Fell filed a notice under Rule 12.2(b)(2) of the Federal Rules of Criminal Procedure of "his intent to introduce expert evidence bearing on a mental condition should he be convicted of a capital crime." *Fell II*, 2013 WL 1953320, at *2. Upon receipt of that notice, the government "sought an unrestricted examination" of Fell. *Id.* The court, in turn, ordered Fell to "undergo a complete psychiatric examination" by a government mental-health expert. *Id.* at *3.

Fell was convicted, and, during opening statements at the sentencing phase, his counsel indicated to the jury his intent to call two mental health experts: a psychologist and a medical doctor practicing in psychiatry. *Fell II*, 2013 WL 1953320, at *3. Fell also introduced documentary evidence pertaining to his social history as a child, medical and school records, and so on. *Id.* In response, the government sent the defense a 72-page report prepared by Dr. Michael Welner, the same expert whose testimony is at issue here. *See id.* at *3-4. Although Welner did not perform Fell's examination, he "provided the questions" for it and reviewed a videotape of it. *Id.* at *4. Based on his review, Welner reported that he had scored Fell "on the PCL-R, a scale

for the assessment of psychopathy," *id.*, and concluded that he was a "psychopath"—notwithstanding that no defense expert had attempted to rely upon parallel testing in support of a mitigating factor, *see, e.g.*, Mot. to Exclude Report and Testimony of Michael Welner at 4, *United States* v. *Fell*, No. 2:01-cr-12 (D. Vt. July 6, 2005), ECF 182.[4] The report also included provocative and inflammatory statements about Fell's character. *See, e.g.*, Report of Michael Welner, M.D. at FELL-000000647, *United States* v. *Fell*, No. 2:01-cr-12 (D. Vt. July 5, 2005), ECF 304-12 ("Donald Fell emerged in his teens as a stimulation-seeking, drug-seeking hedonist who did not take to limit setting."); *id.* at FELL-00000688 ("Mr. Fell's sadism and blood lust are unusual and rarely studied.").

Upon receipt of the report, the defense at first moved to exclude it on multiple grounds, including that Welner administered the PCL-R without prior notice to defense counsel, contrary to a prior court order; that psychopathy had no relevance as rebuttal evidence; and that the report detailed "substantial amounts of unreliable hearsay and uncharged misconduct." *Fell I*, 2006 U.S. Dist. LEXIS 24707, at *13. Before the court ruled on that motion, however, the defense "announced that it would rest without calling any of its mental health experts, and withdrew its Rule 12.2 notice." *Fell II*,

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[4] As discussed below, *see infra* pp. 19-22, the PCL-R (or the Psychopathy Checklist—Revised) is a method used to assess psychopathy in a subject based on a checklist of different factors. Edens et al., *The Impact of Mental Health Evidence on Support for Capital Punishment: Are Capital Defendants Labeled More Psychopathic Considered More Deserving of Death?*, 23 Behav. Sci. & L. 603, 604 (2005). An individual scoring above a certain threshold on the PCL-R is labeled a "psychopath." *Stitt* v. *United States*, 369 F. Supp. 2d 679, 684, 699 (E.D. Va. 2005).

2013 WL 1953320, at *4. Based on that withdrawal, the defense took the position that "the government would then be unable to call Dr. Welner in rebuttal." *Id.* The prosecution argued to the contrary, "point[ing] out that the defense had introduced evidence concerning [the defendant's] mental condition through lay witnesses and through documents[.]" *Id.* In response, the defense entirely "withdrew the mitigating factor that Fell was under mental and emotional disturbance when the crimes were committed." *Id.*; *see* DeMatteo & Edens, *The Role and Relevance of the Psychopathy Checklist-Revised in Court*, 12 Psychol. Pub. Pol'y & L. 214, 232-233 (2006) (describing *Fell* as an example "in which a defense team opted to withdraw mental health mitigation evidence to avoid the prosecution calling a rebuttal witness who would testify about PCL-R and other similar instruments"). Unable to consider any expert mental-health evidence in mitigation, the jury unanimously found that the defendant should receive a death sentence on the two capital counts. *Fell II*, 2013 WL 1953320, at *5.[5]

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[5] In ruling on post-trial motions, the district court sharply criticized Welner's conduct. The court had previously ordered that Fell submit to an examination by a government expert, but had made clear that Welner could not perform the examination. *See Fell I*, 2006 U.S. Dist. LEXIS, at *8-9. The court had also ordered that no mental-health test could be performed without defense counsel's consent or the court's approval. *See id.* The court ultimately found that Welner "deliberately attempted to use [the government expert who performed the examination] to obtain the interview results he was precluded from obtaining on his own" and that Welner had performed the PCL-R without the "required advance notice to the defense before conducting such testing." *Id.* at *26-27.

B. Where Capital Defendants Do Present Mitigating Mental-Health Evidence, The Prosecution's Use Of Expert Testimony Based On The Government's Examination Of The Defendant Can Lead To Unreliable Verdicts

In cases where a defendant does put his mental-state at issue in mitigation, the admission of expert testimony based on the prosecution's own examination of the defendant can lead to unreliable death verdicts if, as is often the case, the scope of the examination and resulting evidence at trial is not narrowly circumscribed.

As the United States acknowledges, "the prosecution should [not] be free to build up a criminal case, in whole or in part, with the assistance of enforced disclosures by the accused." U.S. Br. 12 (quoting *Doe* v. *United States*, 487 U.S. 201, 212 (1988)); *see also Smith*, 451 U.S. at 462; *Powell* v. *Texas*, 498 U.S. 680, 685 n.3 (1989); *cf. Brown* v. *United States*, 356 U.S. 148, 155 (1958) (defendant waives privilege by testifying "only ... on the matters he has himself put into dispute"). In actual practice, however, the use of State-appointed expert witnesses often fails to observe that limit. Compelled state examinations often allow unrestricted intrusions into a defendant's mental functioning, no differently than if it were a piece of physical evidence. And the results of those examinations are commonly presented to the jury as scientific proof that the defendant has an incurable behavioral disorder, even though such predictions are notoriously unreliable and highly prejudicial. The Eighth Amendment's heightened need for reliability accordingly compels that the scope of any Fifth Amendment waiver be carefully policed.

1. Expert "rebuttal" testimony often rests on unreliable and highly prejudicial psychiatric labeling that ranges far beyond the scope of the defendant's mitigating evidence

Rather than focusing on the particular mental-health evidence presented by a defendant, prosecution experts often label capital defendants as having purportedly incurable personality disorders, even where the defendant has not raised a personality disorder as a mitigating circumstance, and even where the "diagnosis" goes beyond the scope of any of the defendant's statements relied on by the defense expert. These generalized labels—"sociopath," "psychopath," "antisocial"—can obscure and overwhelm all other sentencing factors. *See* Wayland & O'Brien, *Deconstructing Prejudicial Psychiatric Labels: A Guidelines-Based Approach*, 42.1 Hofstra L. Rev. (forthcoming 2013) (manuscript at 36), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2279547. Once applied, such labels may be devastating to a case for life, *see id.*, "deriv[ing] unique power over judges and juries from invoking dehumanizing stereotypes masquerading as scientific fact," *id.* (manuscript at 11); *see also* Cunningham & Reidy, *A Matter of Life or Death: Special Considerations and Heightened Practice Standards in Capital Sentencing Evaluations*, 19 Behav. Sci. & L. 473, 479 (2001) (labels "are so profoundly pejorative as to equate with a sentence of death"). As one Texas judge put it in describing the testimony of the late Dr. James P. Grigson (infamously known as "Dr. Death"):

> [W]hen Dr. Grigson speaks to a lay jury, or an uninformed jury, about a person who he characterizes as a "severe" sociopath, which a defendant who has been convicted of capital mur-

> der always is in the eyes of Dr. Grigson, the defendant should stop what he is then doing and commence writing out his last will and testament[.]

Bennett v. *State*, 766 S.W.2d 227, 232 (Tex. Crim. App. 1989) (Teague, J., dissenting).

Moreover, prosecution experts often bolster their claims that the defendant has an incurable personality disorder through purportedly "scientific" techniques that are of dubious reliability. Wayland & O'Brien, 42.1 Hofstra L. Rev. (manuscript at 2-3, 36); *see also* Martens, *The Problem with Robert Hare's Psychopathy Checklist: Incorrect Conclusions, High Risk or Misuse, and Lack of Reliability*, 27 Med. & L. 449, 454 (2008); DeMatteo & Edens, 12 Psychol. Pub. Pol'y & L. at 214; Edens et al., *The Impact of Mental Health Evidence on Support for Capital Punishment: Are Defendants Labeled Psychopathic Considered More Deserving of Death?*, 23 Behav. Sci. & L. 603, 604 (2005). For example, this sort of labeling often occurs through a diagnosis of "psychopathy." The construct of "psychopathy" is "typically operationalized by the Psychopathy Checklist—Revised" ("PCL-R"). Edens et al., 23 Behav. Sci. & L. at 604. Individuals are scored on the PCL-R based on a clinical interview and a review of case history information. Those individuals diagnosed as "psychopaths" based on their scores on the PCL-R test are labeled as "untreatable" and disposed to "actually get worse with help of psychotherapeutic treatment." Martens, 27 Med. & L. at 450.

PCL-R scores are commonly used to assess future dangerousness—a "'super-determining'" aggravating factor at sentencing. Cunningham et al., *Capital Jury Decision-Making*, 15 Psychol. Pub. Pol'y & L. 223, 226

(2009); *see id.* at 225 ("specter" of future violence "is among the most compelling aggravating factors in the jury's death deliberations"); Sandys et al., *Aggravation and Mitigation: Findings and Implications*, 37 J. Psychiatry & L. 189, 215 (2009) ("research indicates that the most persuasive aggravator is juror perceptions of the defendant's future dangerousness").[6] Studies have repeatedly shown, however, that "the use of the PCL-R to predict violent behavior involves substantial and unacceptable rates of error." Freedman, *False Prediction of Future Dangerousness: Error Rates and Psychopathy Checklist—Revised*, 29 J. Am. Acad. Psychiatry L. 89, 91 (2001); *see also* Cunningham & Sorenson, *Improbable Predications at Capital Sentencing: Contrasting Prison Violence Outcomes*, 38 J. Am. Acad. Psychiatry L. 61, 62 (2010); Martens, 27 Med. & L. at 452-454; Edens et al., 23 Behav. Sci. & L. at 605-606. The PCL-R results are plagued, among other things, by "excessive false-positive rates and widely varying positive predictive power." Freedman, 29 J. Am. Acad. Psychiatry L. at 93; *see* Edens et al., 23 Behav. Sci. & L. at 605-606. Indeed, extrapolating from other research, one study concluded that, in a large proportion of cases in which a defendant was sentenced to death based on a prediction of future dangerousness, the prediction may in fact have been wrong. Freedman, 29 J. Am. Acad. Psychiatry L. at 93; *see also* Tex. Defender Serv., *Deadly Speculation: Misleading Texas Capital Juries with False Predictions of Future Dangerousness* 34

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[6] "Even when it is not overtly argued, the 'future dangerousness' of capital offenders appears to be a primary concern of their sentencing jurors[.]" Cunningham & Reidy, 19 Behav. Sci. & L. at 476. Thus, "[w]hether the law allows it or not, the issue of future dangerousness is the crux of a juror's preference for death." Sandys et al., 37 J. Psychiatry & L. at 216.

(2004) (in review of 155 cases, "state-paid expert predictions [about future dangerousness] were inaccurate 95% of the time").[7]

Despite these problems, studies have shown that juries likely place substantial, if not dispositive, weight on a label of "psychopath" in arriving at a sentence of death. DeMatteo & Edens, 12 Psychol. Pub. Pol'y & L. at 215 ("the term psychopath has the strong potential to impact perceptions of a criminal defendant in a deleterious way" and "may be afforded great weight in ... capital sentencing proceedings") (emphasis omitted); *id.* at 232 ("Labeling a criminal defendant as a psychopath can have a pronounced effect on how that person is viewed by laypersons."). One study, for example, found that participants in a mock sentencing "were significantly more likely to vote for death in the psychopathy condition (i.e., 60% ... chose the death penalty) compared with those in the no disorder (38%) and psychosis (30%) conditions." Edens et al., 23 Behav. Sci. L. at 614. And reviewing the results of many studies on the issue, a recent article concluded: "The label 'psychopath' has a profound effect on lay persons' views of capital defendants, because it tends to obscure and over-

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[7] Some courts have recognized the questionable reliability and validity of the PCL-R and the psychopathy label and have precluded their use. *See United States* v. *Taylor*, 320 F. Supp. 2d 790, 794 (N.D. Ind. 2004) (government prohibited from utilizing PCL-R "due to the uncertainty of the validity and reliability ... as it is used in capital sentencing hearings"); *see also United States* v. *Sampson*, 335 F. Supp. 2d 166, 222 n.27 (D. Mass. 2004) (government's expert, Dr. Michael Welner, precluded from using term "psychopath" because of its likely effect on the jury). In one capital case, a government expert conceded the limitations and unreliability of the PCL-R and recanted testimony based upon it. *See Stitt*, 369 F. Supp. 2d at 699-700.

whelm other relevant mental health evidence." Wayland & O'Brien, 42.1 Hofstra L. Rev. (manuscript at 36).

2. Expert testimony based on government examinations of the defendant has resulted in prejudice in many cases

The case of capital defendant Randall Dale Adams illustrates the influence a personality-disorder label can exert at sentencing, particularly where the prosecution expert purports to base that conclusion on a personal interview with the defendant. In 1977, Adams was convicted of murdering a Dallas police officer, a capital crime. *See* Martin, *Randall Adams, 61, Dies; Freed with Help of Film*, N.Y. Times, June 25, 2011. At sentencing, to establish future dangerousness, the prosecution presented the expert psychiatric testimony of Dr. John Holbrook and Dr. Grigson. *Adams* v. *State*, 577 S.W.2d 717, 731 (Tex. Crim. App. 1979), *rev'd*, *Adams* v. *Texas*, 448 U.S. 38, 40 (1980). Holbrook told the jury that he had "examined [Adams] and determined that [Adams] has the profile and characteristics of a sociopath"; that he "would expect little or no change in this diagnosis in the future"; and that Adams "would commit criminal acts of violence in the future that would constitute a continuing threat to society." *Id.*

Grigson also examined Adams. During the examination, Grigson asked such questions as what it meant to say "'a rolling stone gathers no moss'" or "'a bird in the hand is worth two in the bush.'" Yant, *Presumed Guilty: When Innocent People Are Wrongfully Convicted* 27 (1991). Grigson also asked Adams whether he had any remorse for murdering the police officer, to which Adams responded that he had been framed and that he could not have remorse for a crime he did not commit. *Id.*

Based on that examination, Grigson told the jury at sentencing: "'I would place Mr. Adams at the very extreme, worse or severe end of the scale. You can't get beyond that .... There is nothing known in the world today that is going to change this man; we don't have anything.'" Dorland & Krauss, *The Danger of Dangerousness in Capital Sentencing: Exacerbating the Problem of Arbitrary and Capricious Decision-Making*, 29 Law & Psychol. Rev. 63, 102 (2005). Grigson went on: "'[T]here is no question in my mind that Adams is guilty'" and "'will kill again.'" Tanner, *"Continuing Threat" to Whom?: Risk Assessment in Virginia Capital Sentencing Hearings*, 17 Cap. Def. J. 381, 398 n.133 (2005); *see Gardner* v. *Johnson*, 247 F.3d 551, 556 n.6 (5th Cir. 2001) (Grigson testified that he was "'*one hundred percent certain* Adams would kill again'") (emphasis in original); *Flores* v. *Johnson*, 210 F.3d 456, 467 n.16 (5th Cir. 2000) (Garza, J., concurring).

The jury sentenced Adams to death. *See Adams*, 577 S.W.2d at 719. Shortly before his execution, however, this Court issued a stay and granted certiorari. *See Adams* v. *Texas*, 444 U.S. 990 (1979) (mem.). After this Court reversed the death sentence on the ground that the trial court unconstitutionally excluded members of the venire, *see Adams*, 448 U.S. at 40, it was "'revealed [on remand] that the evidence against Adams was falsified by the police.'" *Gardner*, 247 F.3d at 556 n.6. Adams was subsequently "'released as innocent'" after spending 12 years in prison. *Id.*

Peter Vanderweaghe's case presents a similar example. In *State* v. *Vandeweaghe*, 827 A.2d 1028 (N.J. 2003), the defendant admitted to assaulting the victim, but claimed that self-induced intoxication prevented him from being able to form the requisite *mens rea* for purposeful or knowing murder. *See id.* at 1029-1030.

The defendant called an expert in support of his intoxication defense, and the State, purportedly in rebuttal, called Dr. Welner. *See id.* at 1031.

Welner began by testifying that the defendant was "not unduly influenced by alcohol" and "acted purposely or knowingly." *Vandeweaghe*, 827 A.2d at 1031. But then, as he did in Cheever's case, Welner went on. Relying on his interview with the defendant, Welner opined that the defendant "suffered from antisocial personality disorder," *id.*, and that he "had a history of alcohol and intravenous drug abuse, as well as a record of 'lawbreaking,'" *id.* at 1032. Welner then stated that "a person with antisocial personality 'has a longstanding history of being able to lie and to lie successfully," and concluded, in discussing his assessment of the defendant's remorse and recollection of the crime:

> I felt that [the defendant] sounded sincere all the time. I felt that if I was sitting there and if I would close my eyes and listen to him, or even just open my eyes and listen to him, that I would have found him utterly believable. If I would have sat with [the defendant] and he would have been my entire source of information he would leave me with the impression that everything happened exactly as it did.

Id.

The defendant was convicted of murder, but that conviction was overturned. *See Vandeweaghe*, 827 A.2d at 1029-1030. The New Jersey Supreme Court rejected the state's argument that the defendant's expert had "'opened the door,'" *id.* at 1033, and held that Welner's testimony "was so prejudicial as to clearly produce an unjust result and deny [the] defendant the right to a fair trial," *id.* at 1035.

3. Defendants should not be forced, as Cheever was in this case, to subject themselves to prejudicial and unreliable expert testimony based on their own compelled statements as the price of presenting mitigating evidence

As the above discussion demonstrates, wide-ranging expert testimony for the prosecution invoking labels such as "psychopath" can be as prejudicial as it is unreliable. And that testimony becomes all the more powerful where—as here—a mental-health expert obtains access to a defendant's mind and then recounts to the jury statements that were "'forc[ed] ... from'" the defendant's "'own lips,'" *Smith*, 451 U.S. at 462, to support a claim that the defendant's conduct was volitional or reflected an immutable personality disorder or evil character. Indeed, that compelled access distinguishes the analogy that petitioner and the United States press at length: the cross-examination of a testifying defendant. *See* Pet. Br. 23-24; U.S. Br. 13-17. To the extent that any such analogy even applies, *see* Resp. Br. 17-18, it supports Cheever's position, not petitioner's, given the stark differences between an unrestricted mental-health evaluation and a cross-examination in court:

> A defendant who testifies in his or her own defense at trial will be subjected to examination by the government; but the defendant will be protected by the rules of evidence and the presence of counsel. Thus, the questions permitted will ordinarily be limited to those which relate to the subject matter of defendant's direct testimony and are otherwise proper. In contrast, the scope of questions which may be put to a defendant during a government psychiatric examination is apparently limitless and

> ... any limits which might be appropriate could not be enforced because the defendant is not represented by counsel at the examination.

White, *The Psychiatric Examination and the Fifth Amendment in Capital Cases*, 74 J. Crim. L. & Criminology 943, 962 (1983).

Dr. Welner's testimony in this case demonstrates the dangers of unchecked expert testimony based on a compelled examination that is loosely restricted in scope. As in *Vandeweaghe*, Welner did not confine his testimony in this case to the mental-state issue that Cheever raised—whether Cheever's long-term methamphetamine addiction rendered him incapable of premeditating. Instead, Welner delved into a wide-ranging analysis of the internal workings of Cheever's mind. Welner discussed "the possibility of a dissociative condition" and "personality disorders" as explanations for Cheever's conduct, even though Cheever had not raised those disorders in his defense. JA 132-133. He opined that "[w]hat a personality disorder is is that everybody else doesn't want you to be that way, but you want to be that way because it suits you." JA 133. And he discussed at length Cheever's alleged "fascination with outlaws[.]" JA 134; *see also* JA 156 ("I don't think that the methamphetamine affected his decision to be an outlaw and to identify with outlaws and to make decisions as outlaws do."); JA 157 (Cheever "identified not only with outlaws but outlaws who were engaged in fatal shootouts with police officers").

Welner even went so far as to give a "moment-by-moment" narration of Cheever's thoughts, sometimes in the first person. Pet. App. 42. As the Kansas Supreme Court found, this testimony "virtually put words into Cheever's mouth," "giving a moment-by-moment

recounting of Cheever's observations and actual thoughts" that painted Cheever "as a person who had chosen an antisocial outlaw life and who was indifferent to the violence he had committed." Pet. App. 42-43 (citing *State* v. *Vandeweaghe*, 799 A.2d 1 (N.J. Super. Ct. App. Div. 2002), *aff'd*, 827 A.2d 1028 (N.J. 2003)). The ultimate effect of Welner's testimony was "devastating." *Id.* at 42. Far from simply rebutting Cheever's intoxication defense, the state and Welner used a compelled examination "to *prosecute* based upon" Cheever's compelled statements and mental health. *Williams*, 731 F. Supp. 2d at 1020. And, even though Welner's testimony was offered during the guilt phase, the same jury sentenced Cheever to death; it is therefore likely that Welner's testimony had at least some effect on the jury's consideration of whether death was an appropriate punishment.

* * *

As this case and other examples illustrate, permitting the prosecution to introduce unrestricted expert "rebuttal" testimony based on a compelled examination of the defendant does nothing to promote the reliability of verdicts, as the State contends. Instead, it can inject prejudicial and unreliable considerations into capital verdicts that in many cases have either deterred defendants from exercising their Eighth Amendment rights or subjected them to damning consequences for doing so. For that reason, in addition to the reasons Respondent articulates (at 25-42), there should be no waiver of the Fifth Amendment privilege against self-incrimination in such a circumstance. At minimum, to preclude the overreaching that has occurred in many capital cases, the Court should hold that any Fifth Amendment waiver can arise only where a defendant presents expert mental-health evidence based on an in-

person examination and that the scope of such a waiver must be narrowly confined to the statements the defendant made to his own expert.

CONCLUSION

The judgment of the Supreme Court of Kansas should be affirmed.

Respectfully submitted.

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JULY 2013

AMICUS CURIAE BRIEF

RECORD
AND

No. 12-609

Supreme Court, U.S.
FILED
MAY 20 2013
OFFICE OF THE CLERK

In the Supreme Court of the United States

STATE OF KANSAS, *Petitioner,*

v.

SCOTT D. CHEEVER, *Respondent.*

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF KANSAS

BRIEF OF THE STATES OF CALIFORNIA, ALABAMA, ARIZONA, ARKANSAS, DELAWARE, FLORIDA, GEORGIA, HAWAII, KENTUCKY, MISSOURI, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, WASHINGTON, WISCONSIN, WYOMING AS AMICI CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

When a criminal defendant affirmatively introduces expert testimony that he lacked the requisite mental state to commit capital murder of a law enforcement officer due to the alleged temporary and long-term effects of the defendant's methamphetamine use, does the State violate the defendant's Fifth Amendment privilege against self-incrimination by rebutting the defendant's mental state defense with evidence from a court-ordered mental evaluation of the defendant?

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W. LaFave, *Substantive Criminal Law* § 9.5(a), at 43 n.8 (2d ed. 2003) 21, 22

INTEREST OF AMICI CURIAE

This case presents the question whether the Fifth Amendment privilege against compelled self-incrimination can be asserted to bar prosecution expert testimony that relies upon statements made by the defendant in a court-ordered mental evaluation, when that testimony is offered to rebut defense expert testimony on the same subject. Those accused in state courts of crimes requiring proof of a specific intent, such as premeditation to kill, routinely assert voluntary intoxication and other mental status defenses as a means to negate that element or establish an affirmative defense. As in the present case, those defenses may be advanced through expert witnesses whose testimony calls into question the contents of previous mental examinations. Amici States therefore have a substantial interest in this Court's determination whether those defendants can successfully assert the Fifth Amendment privilege against compelled self-incrimination to bar responsive in-kind evidence from the prosecution.

Amici States have a concordant interest in whether the answer to that question depends upon a given State's rules of evidence governing mental defense procedures, or whether it is resolved by uniform application of constitutional doctrine.

SUMMARY OF ARGUMENT

The Kansas Supreme Court erred by holding that, although respondent Cheever had presented expert testimony to support his mental status

defense, his Fifth Amendment privilege against compelled self-incrimination precluded in-kind prosecution rebuttal evidence. By choosing to advance his defense, Cheever placed at issue statements he made during a court-ordered mental evaluation. He thus opened the door to reciprocal expert opinion testimony drawing upon those statements, and should not have been able to hide behind his Fifth Amendment privilege when the prosecution sought to provide the jury with that responsive evidence.

1. The position advocated by Amici States is a straightforward application of established principles informing the scope of the privilege against self-incrimination. This Court has held consistently that a defendant's decision to introduce evidence on his or her behalf forecloses his or her ability to assert the Fifth Amendment privilege to prevent the prosecution from exploring and challenging that evidence. *Fitzpatrick* v. *United States*, 178 U.S. 304, 315 (1900); *Brown* v. *United States*, 356 U.S. 148, 155-156 (1958). This axiom is rooted in an interest in fair criminal proceedings designed to ascertain the truth of disputed facts.

By extension, as suggested in *Powell* v. *Texas*, 492 U.S. 680, 683-685 (1989) (per curiam), *Estelle* v. *Smith*, 451 U.S. 454, 465 (1981), and *Buchanan* v. *Kentucky*, 483 U.S. 402, 423-424 (1987), defense introduction of psychiatric evidence precludes use of the Fifth Amendment as a bar to reciprocal prosecution rebuttal expert testimony that draws upon statements the defendant made during a court-ordered examination. The scope of the privilege against self-incrimination should not depend on how

state law classifies a mental defense for purposes of ordering the defendant to submit to an evaluation. Rather, it should turn on whether the defense has presented expert testimony that places the contents of a court-ordered mental evaluation at issue.

In particular, the subjective nature of psychiatry as a scientific discipline, and the technical and scientific issues occasioned by a mental state defense, often requires that juries hear expert testimony from both sides. This Court explored the underpinnings of that need in *Ake* v. *Oklahoma*, 470 U.S. 68 (1985), concluding that juries "must resolve differences in opinion within the psychiatric profession on the basis of the evidence offered by each party." *Id.* at 81. In addition, because opinions on mental status issues typically rely upon statements made by the defendant during psychological evaluations, depriving an expert of that basis by injecting Fifth Amendment restrictions into his or her testimony may well strip opinions of their foundations and render them irrelevant. See, *e.g.*, Fed. R. Evid. 702(b), (d).

2. In this case, the Kansas Supreme Court erred by conflating the scope of the Fifth Amendment privilege against self-incrimination with state rules of evidence it interpreted as providing the exclusive circumstances under which a defendant "waives" the privilege when presenting a mental defense. In essence, Kansas has yoked the availability of the privilege against self-incrimination to the substantive mental status defense offered by a defendant. The Kansas Supreme Court held that, when the substance of the mental defense does not trigger a mental examination and subsequent

"waiver" of the privilege, the privilege remains intact, even where the defendant offers expert testimony that places his or her statements into dispute on the question of *mens rea*.

In view of the diverse range and variety of approaches to mental defenses among the States, affirming the lower court's decision would in effect constitutionalize state definitions and labels of mental status defenses. As a result, juries in some states could hear rebuttal expert opinion on given mental state issues, while juries in other states could not.

Moreover, by parsing out the substantive particulars of a mental state defense to determine whether the privilege against self-incrimination can be properly asserted, the Kansas Supreme Court's approach offers defendants an incentive to "game the system" by carefully circumscribing their mental defenses to avoid Fifth Amendment "waivers," while preserving the admissibility of their own expert's testimony. This result would be unjust, inimical to the truth-finding process, and at odds with a consistent application and coherent interpretation of the Constitution.

ARGUMENT

I. A DEFENDANT MAY NOT INVOKE THE FIFTH AMENDMENT TO PREVENT THE PROSECUTION FROM ELICITING RESPONSIVE EXPERT TESTIMONY THAT DRAWS UPON STATEMENTS MADE DURING A COURT-ORDERED MENTAL EVALUATION

This case calls for the straightforward application of an established principle: When a

defendant presents a defense that opens the door to prosecution rebuttal evidence predicated upon statements made by the defendant, that door must remain open. A defendant may not use the Fifth Amendment's privilege against compelled self-incrimination as a shield just because the rebuttal evidence draws upon statements made during the defendant's court-ordered mental evaluation.

1. The privilege against self-incrimination is rooted in "our sense of fair play" in interactions between the government and individuals. *Murphy* v. *Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 55 (1964). Fairness goes both ways. A basic example is that a defendant "has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts." *Fitzpatrick* v. *United States*, 178 U.S. 304, 315 (1900); see also *Brown* v. *United States*, 356 U.S. 148, 155-156 (1958) (a defendant may not claim a Fifth Amendment immunity from cross-examination upon matters he chooses to put in dispute). Thus, when a defendant offers evidence on his own behalf, "[t]he interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination." *Brown*, 356 U.S. at 156; see also Christopher Slobogin, *Estelle* v. *Smith: The Constitutional Contours Of The Forensic Evaluation*, 31 Emory L.J. 71, 100 (1982) ("As Justice Frankfurter's language [in *Brown*] suggests, the defendant who takes the stand may be compelled to talk, not because he has 'waived' his Fifth Amendment privilege, but because

his direct testimony standing unchallenged would tip the state-individual balance in his favor."); *Mitchell* v. *United States*, 526 U.S. 314, 322 (1999); *cf. Wong* v. *Belmontes*, 558 U.S. 15, 24 (2009) (observing in murder case that defense evidence about defendant's mental state "seeking to explain his behavior, or putting it in some favorable context" would have opened the door to responsive prosecution evidence that defendant had killed before).

It is not just a defendant's choice to take the stand and testify that informs the limits of the Fifth Amendment privilege. The scope of the privilege pivots off other defense trial strategies as well. This Court has indicated on more than one occasion that fair play implies a limit on Fifth Amendment protection when, as in this case, the defendant chooses to present a mental status defense and the prosecution seeks to reciprocate with expert psychiatric testimony. *Powell* v. *Texas*, 492 U.S. 680, 683-685 (1989) (per curiam) ("[I]t may be unfair to the state to permit a defendant to use psychiatric testimony without allowing the state a means to rebut that testimony . . . ."); *Estelle* v. *Smith*, 451 U.S. 454, 465 (1981) ("When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he has interjected into the case.").

Estelle v. *Smith* held that a defendant may not be compelled to speak to a psychiatrist when the defendant did not request the evaluation or attempt to introduce mental status evidence, and that the prosecution may not use such statements against

him. 451 U.S. at 468. But the opinion was limited to the "distinct circumstances" where the defendant chose not to introduce psychiatric evidence, gave no indication that he might, and was unaware that his statements would be used by the State to secure the death penalty. *Id.* at 466, 472. "[A] different situation arises where a defendant intends to introduce psychiatric evidence at the penalty phase." *Id.* at 472; see also *Penry* v. *Johnson*, 532 U.S. 782, 795 (2001) (distinguishing *Estelle* v. *Smith* by noting that the Fifth Amendment analysis "might be different" where a defendant chooses to put on mental state evidence in his defense).

The nature of the defense strategy similarly informed this Court's analysis in *Buchanan* v. *Kentucky*, 483 U.S. 402 (1987). *Buchanan* clarified that, if a defendant seeks a mental evaluation or offers mental status evidence, "at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution." *Id.* at 422-423. This principle was central to *Buchanan's* conclusion that no Fifth Amendment violation occurred where the defendant himself joined the request for a mental examination, and then presented a mental defense based on "extreme emotional disturbance." *Id.* at 423-424.

These precedents apply with equal strength to a situation such as that presented in this case, where (1) the defendant undergoes a court-ordered mental examination, (2) he elects to present expert psychiatric testimony on the issue of guilt, and (3)

the prosecution offers rebuttal expert testimony that draws upon statements the defendant made during the court-ordered examination. The determining factor in the Fifth Amendment analysis, as in any case, is that the defense advances evidence opening the door to in-kind rebuttal.

Lower courts have, for many years, utilized this approach in cases presenting facts analogous to those here. For example, the District of Columbia Circuit in *United States* v. *Byers*, 740 F.2d 1104 (D.C. Cir. 1984), held that prosecution psychiatric testimony based on a compulsory mental examination of the defendant was admissible after the defense introduced psychiatric testimony to support an insanity claim. *Id.* at 1115. In so doing it noted that that "virtually all other circuits" considering the issue "have uniformly" reached the same conclusion. *Id.* at 1111 (collecting cases).[1] The Fifth Circuit concurred in *Battie* v. *Estelle*, 655 F.2d 692 (5th Cir. 1981), acknowledging that "virtually every other federal and state court addressing this issue" has concluded that a defendant waives his or her Fifth Amendment privilege by deciding to introduce psychiatric testimony to advance a mental defense, "in the same manner as would the defendant's election to testify at trial." *Id.* at 701-702 & nn.22, 23

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[1] See also, *e.g.*, *Gibbs* v. *Frank*, 387 F.3d 268, 274 (3d Cir. 2004); *United States* v. *Curtis*, 328 F.3d 141, 144-145 (4th Cir. 2003); *Savino* v. *Murray*, 82 F.3d 593, 604 (4th Cir. 1996), cert. denied, 518 U.S. 1036 (1996); *Washington* v. *Murray*, 952 F.2d 1472, 1480 (4th Cir. 1991); *Silagy* v. *Peters*, 905 F.2d 986, 1005 (7th Cir. 1990); *Vardas* v. *Estelle*, 715 F.2d 206, 210 (5th Cir. 1983).

(cited with approval by *Powell* v. *Texas*, 492 U.S. at 683-684). Examples of analogous state court holdings likewise abound. See *State* v. *Martin*, 950 S.W.2d 20, 24 (Tenn. 1997) ("Virtually every . . . state court jurisdiction has held that where a defendant raises an insanity defense, the Fifth Amendment right against self-incrimination is not violated by a court-ordered psychiatric examination or by the prosecution's use of evidence from the examination to rebut evidence introduced by the defendant.").[2]

Lower court decisions on this issue are numerous and consistent in outcome because they promote criminal proceedings that are fair, and faithful to their truth-seeking function. As one court phrased it, to deny the State the opportunity to "follow where [the defendant] has led" would have an "unreasonable and debilitating effect . . . upon society's conduct of a fair inquiry into the defendant's culpability." *United States* v. *Byers*, 740 F.2d at 1113. Another cited "the State's overwhelming difficulty in responding to the defense psychiatric testimony without its own psychiatric examination of the accused and by the need to prevent fraudulent mental defenses." *Battie* v. *Estelle*, 655 F.2d at 702 (footnote omitted); see also *Schneider* v. *Lynaugh*, 835 F.2d 570, 576 (5th Cir. 1988) ("It is unfair and

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[2] See, *e.g.*, *Lewis v. State*, 195 P.3d 622, 633 (Alaska Ct. App. 2008); *Arnold* v. *Commonwealth*, 192 S.W.3d 420, 425 (Ky. 2006); *Nance* v. *State*, 272 Ga. 217, 219, 526 S.E.2d 560, 564-565 (2000), cert. denied, 531 U.S. 950 (2000); *Hartless* v. *State*, 327 Md. 558, 564-566, 611 A.2d 581, 584-585 (1992); *State* v. *Briand*, 130 N.H. 650, 658, 547 A.2d 235, 240 (1988); *State* v. *Jackson*, 77 N.C. App. 491, 499, 335 S.E.2d 903, 908 (1985); *State v. Whitlow*, 45 N.J. 3, 23, 210 A.2d 763, 774 (1965).

improper to allow a defendant to introduce favorable psychological testimony and then prevent the prosecution from resorting to the most effective and in most instances the only means of rebuttal: other psychological testimony."). No matter how articulated, these rationales are variations on a theme: When a defendant offers expert testimony that places his or her statements at issue, the privilege against compelled self-incrimination bows to the interests of truth and fairness.

2. There are two key reasons why defense mental state evidence allows reciprocal expert testimony.

a. First, given the subjective nature of psychiatry as a scientific discipline, and the technical and scientific issues implicit in a mental state defense, the jury's truth-seeking function is best served by hearing expert testimony from both sides. Opinions on mental state issues are generally characterized by a greater degree of subjectivity than typical of other forensic science disciplines. The Court explained in *Ake* v. *Oklahoma*, 470 U.S. 68 (1985):

> Psychiatry is not . . . an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms . . . . Perhaps because there often is no single, accurate psychiatric conclusion on legal insanity in a given case, juries remain the primary factfinders on this issue, and they must resolve differences in opinion within the psychiatric profession

> on the basis of the evidence offered by each party.

Id. at 81; see also Daniel W. Shuman, *Psychiatric and Psychological Evidence* § 6.2 (3d ed. 2005) ("Psychiatry and psychology are not value-free and the school of thought a psychiatrist or psychologist chooses to embrace is a function of a multitude of considerations, some of which involve personal values."). Thus, juries receiving expert evidence on a mental state issue are inevitably well-served by hearing opposing points of view.

In view of the potential for disagreement among experts on matters of psychology or psychiatry, this Court's warning that "[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it," *Daubert* v. *Merrell Dow Pharms.*, 509 U.S. 579, 595 (1993) (quotations omitted), resonates with particular strength. Concepts employed in the fields of psychology, psychiatry, and neurology will be "inevitably . . . complex and foreign" to lay jurors. *Ake* v. *Oklahoma*, 470 U.S. at 81. Accordingly, "[b]y organizing a defendant's mental history, examination results and behavior, and other information, interpreting it in light of their expertise, and then laying out their investigative and analytic process to the jury, the psychiatrists for each party enable the jury to make its most accurate determination of the truth on the issue before them." *Id.* While *Ake* addressed an insanity defense, the Court's observations hold true when a mental state defense of any variety occasions testimony from experts. See, *e.g.*, *State* v. *Briand*, 547 A.2d at 237 (recognizing that, "[r]egardless of the proposed defense," a lay jury is ill-equipped to

evaluate expert psychiatric testimony unless "the State has an opportunity to produce evidence of a similar quality in rebuttal").

b. Second, an expert providing testimony on mental state issues will characteristically draw upon statements made by the defendant as grounds for opinions. See *Clark* v. *Arizona*, 548 U.S. 735, 758 (2006) (evidence of mental disease usually presented through experts who base opinions on psychiatric examinations of the defendant); *State* v. *Briand*, 547 A.2d at 239 (experts providing mental state evidence will require the defendant's account of events at issue, as well as psychological and psychiatric history, in order to form opinions). A mental health assessment of a criminal defendant will typically consist of neurological examination, clinical interviewing, and psychological testing as "three overlapping modalities." John Parry, *Criminal Mental Health and Disability Law, Evidence, and Testimony* 285 (2009). Statements from the defendant, rather than measurements or instrument output, will be the data points generated under any approach to a mental examination. Shuman, *supra*, at § 1:12 ("Diagnostic techniques in psychiatry and psychology depend, to a large extent, on the patient's self-report of complaints . . . ."); *United States* v. *Haworth*, 9[illegible] F. Supp. 1406, 1408 (D. N.M. 1996) ("'[T]he basic tool of psychiatric study remains the personal interview . . . .'") (citation omitted). Thus, a defendant's statements will be the foundational building blocks for the expert's opinions.

That observation holds true in this case, where the substance of the voluntary intoxication defense squarely placed at issue the contents of Cheever's

dual mental evaluations, both of which involved Cheever's statements to the examiners as key components. See J.A. 35, 47-52, 56-57, 62, 63, 67-69, 85-86, 89, 114-118, 126-127, 134-135, 137. This defense trial strategy opened the door to prosecution testimony that likewise considered statements made during a mental examination. See *Blaisdell* v. *Commonwealth*, 372 Mass. 753, 766, 364 N.E.2d 191, 200 (1977) ("[A] defendant who seeks to put in issue his statements as the basis of psychiatric expert opinion in his behalf opens to the State the opportunity to rebut such testimonial evidence in essentially the same way as if he himself had testified.").

Conversely, limiting an expert's ability to rely upon statements made during a mental examination may deprive resulting opinions of necessary foundation, rendering them irrelevant. When a defendant makes statements in a mental examination that an expert witness considers in forming a conclusion, those statements will be necessary components to an admissible expert opinion. Any expert opinion "is a syllogism: the major premise is the validity of the general theory or technique, the minor premise is the case specific data, and the application of major to minor yields a conclusion relevant to the merits of the case." Kenneth S. Broun, 1 *McCormick on Evidence* 72 (6th ed. 2006); see also Edward J. Imwinkelried, *The "Bases" Of Expert Testimony: A Syllogistic Structure Of Scientific Testimony*, 67 N.C. L. Rev. 1, 2-3 (1988); accord Fed. R. Evid. 702(d). An expert opinion that does not apply theory to data may lack both foundation and, consequently, relevance. *E.g.*, Fed.

R. Evid. 702(b), (d). When a defendant's statements constitute case-specific "data" for an expert, the expert's testimony on mental status will inevitably require express reliance upon them to explain opinions. The fact that an opposing party's expert may rely on different statements, or no statements at all, is of no import to this conclusion.

3. In keeping with the principle of reciprocity, however, permitting the prosecution to respond in-kind to defense expert testimony is not a blank check for the government. Prosecution expert testimony drawing upon a court-ordered mental evaluation of a defendant may be offered only in rebuttal to a mental status defense. See, *e.g.*, *State* v. *Reid*, 981 S.W.2d 166, 171 (Tenn. 1998). The scope of this protection is equivalent to the use and derivative use immunity set forth in *Kastigar* v. *United States*, 406 U.S. 441, 453 (1972). And the prosecution's rebuttal may rebut, but no more.[3] The Supreme Court of Ohio correctly characterized responsive evidence from the prosecution as only what is necessary to maintain "a level playing field between the state and the defense as to expert testimony." *State* v. *Goff*, 128 Ohio St. 3d 169, 183, 942 N.E.2d 1075, 1088 (2010). Nor do Amici contend here that the mere act of filing a notice that a mental defense may be offered bars a criminal defendant from asserting his or her Fifth

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[3] The trial court in the present case understood this limitation, as evidenced by its admonition to the prosecution that it could present its rebuttal testimony "as long as you stay targeted on debugging the voluntary intoxication defense, but if you get far afield from that, I think I may have some trouble with that." J.A. 92.

Amendment rights. See, *e.g.*, *United States* v. *Hall*, 152 F.3d 381, 398 (5th Cir. 1998), cert. denied 526 U.S. 1117 (1999).

In sum, this Court should clarify that the privilege against self incrimination does not bar prosecution rebuttal evidence on mental state defenses that is directly responsive to defense expert testimony, notwithstanding state rules providing for "waiver" of the privilege under more limited circumstances. Principles of fair play and ascertainment of the truth require this approach:

> The issue of whether a defendant is criminally responsible for the offense with which he is charged is a fact for the jury to decide. Accordingly, the Commonwealth must have the right to rebut this position, a right which necessarily includes obtaining its own independent examination of the defendant. Since the results of the Commonwealth's examination are admissible only to rebut the mental health evidence introduced by the defense, Appellant can preclude introduction of the Commonwealth's evidence by declining to assert such evidence on his own behalf.

Arnold v. *Commonwealth*, 192 S.W.3d at 425, quoting *Bishop* v. *Caudill*, 118 S.W.3d 159, 164 (Ky. 2003) (quotation marks omitted). This logic guides the equitable reach of the Fifth Amendment.

II. THE KANSAS SUPREME COURT ERRED BY TETHERING THE SCOPE OF THE FIFTH AMENDMENT PRIVILEGE TO STATE-SPECIFIC PROCEDURES

1. The principles set forth above stand in stark relief to the reasoning employed by the Kansas Supreme Court in this case. That court erred by conflating the scope of the Fifth Amendment privilege against self-incrimination with state rules of evidence interpreted as providing the exclusive circumstances under which a defendant "waives" his or her privilege by presenting a mental defense. In essence, the Kansas Supreme Court has yoked the availability of the privilege against self-incrimination to the categorical label the State Legislature placed upon the mental status defense. But, "a state statute does not and cannot define the scope of constitutional rights." *Anaya* v. *Crossroads Managed Care Sys.*, 195 F.3d 584, 591 n.2 (10th Cir. 1999).

In Kansas, if a defendant indicates that he or she may pursue a defense based upon a permanent "mental disease or defect," that decision sets off a chain of events which may, in the eyes of the Kansas Supreme Court, end in a "waiver" of the privilege for purposes of prosecution expert rebuttal testimony. Conversely, the Kansas Supreme Court maintained, if this chain of events does not exist because the mental state defense does not fit statutory terminology, the Fifth Amendment privilege remains intact no matter what other strategic choices the defendant makes at trial, including presentation of expert testimony that places his or her statements into dispute on the question of *mens rea*.

A State may enact rules and laws providing more protection to criminal defendants than that afforded by the Federal Constitution.[4] See, *e.g.*, *Nichols* v. *United States*, 511 U.S. 738, 748 n.12 (1994). But the reasoning of the lower court in this case was erroneous because it was premised ultimately on a perceived violation of the Federal Constitution. Pet. App. 35. More specifically, what a State high court may not do is instruct its lower courts that the scope of the Fifth Amendment privilege hinges upon the vagaries and nuances of state evidence rules. The Kansas court's approach dictates as constitutional doctrine that juries in some states can hear rebuttal expert opinion on given mental state issues, while juries in other states cannot. Mental defense labels, definitions, and limitations vary substantially from jurisdiction to jurisdiction and thus are particularly ill-suited to defining the contours of the Fifth Amendment. What matters should not be the assumptions of waiver teased out of individual States' laws, but rather whether defense expert testimony is actually received that places the contents of a court-ordered mental evaluation at issue.

2. Here, Cheever "asserted a voluntary intoxication defense, based on the theory that methamphetamine use had rendered him incapable of forming the necessary premeditation" required for commission of those crimes. Pet. App. 10. The

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[4] Of course, if a State "determines that its State's laws call for protection more complete than the Federal Constitution demands," the state court must "be clear about its ultimate reliance on state law." *Ohio* v. *Robinette*, 519 U.S. 33, 44 (1996).

defense expert, Dr. Roswell L. Evans, Jr., was allowed to testify that Cheever had poisoned his brain to the point that it functioned at a significantly subnormal level. The Kansas Supreme Court held, however, that Dr. Michael Welner, a forensic psychiatrist who had conducted a court-ordered mental examination of Cheever in a related federal proceeding, should not have been permitted to controvert.

The Kansas court's rationale rested upon a sequence of events informed by Kansas criminal procedures. The end product was the court's assumption that the privilege against self-incrimination would be "waived", and prosecution expert testimony based on a court-ordered mental examination permitted, only if each of the following criteria is satisfied:

> (1) A criminal defendant files a timely notice of intent to assert at trial that he or she, "as a result of mental disease or defect lacked the mental state required as an element of the offense charged." Pet. App. 28; Kan. Stat. Ann. § 22-3219(1).
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> (2) The defendant actually "presents evidence at trial that he or she lacked the requisite criminal intent due to a mental disease or defect." Pet. App. 31.
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> (3) The "mental disease or defect" at issue is the basis for a "mental capacity" defense. Pet. App. 32.
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> (4) The mental capacity defense does not rely upon evidence of "voluntary-intoxication-induced-temporary mental incapacity at the time of the crime" or another condition not meeting the State's

> definition of "mental disease or defect." Pet. App. 32-35.

Under any other circumstances, the state court held, the Fifth Amendment privilege remains intact and may be asserted to bar to prosecution rebuttal testimony.

3. The Kansas court's approach is ultimately unworkable because it leaves the scope and contours of the Fifth Amendment subject to the vicissitudes of state labeling of mental defenses, and not simply to whether the defendant chooses to present a defense that opens the door to rebuttal evidence.

Certainly the States and Federal Government possess wide latitude to adopt rules of evidence permitting—or not—mental status defenses to criminal conduct, entirely apart from whether a compelled examination is admissible under the Fifth Amendment. Variety in this regard is the rule, not the exception. This Court explained why by citing

> the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds. The doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States.

Powell v. *Texas*, 392 U.S. 514, 535-536 (1968) (plurality opinion, footnote omitted). On other occasions the Court has recognized that states have historically made divergent and even transitory policy choices on the admissibility of mental defenses. See, *e.g.*, *Clark* v. *Arizona*, 548 U.S. at 750-752, 778-779; *Montana* v. *Egelhoff*, 518 U.S. 37, 46-49, 51 (1996); *Foucha* v. *Louisiana*, 504 U.S. 71, 88-89 (1992) (O'Connor, J., concurring); *Fisher* v. *United States*, 328 U.S. 463, 473-476 (1946).

Mental defenses may take many forms, including showings of insanity, "an enduring incapacity to form the criminal state of mind necessary to the offense charged," and "the actual state of mind" at the time of the crime. *Clark* v. *Arizona*, 548 U.S. at 767-768 & 768 n.38. California's experience illustrates how rules governing admissibility of mental defenses hinge upon fine points of distinction, and even then evolve over time. According to the California Supreme Court, "[t]he essence of a showing of diminished capacity is a 'showing that the defendant's mental capacity was reduced by mental illness, mental defect or intoxication.'" *People* v. *Steele*, 27 Cal. 4th 1230, 1253, 47 P.3d 225, 240 (2002) (quotation & citation omitted), cert. denied, 537 U.S. 1115 (2003). But, through the legislative and voter initiative processes, the defense of diminished capacity was abolished in the early 1980s. *People* v. *Wright*, 35 Cal. 4th 964, 978, 111 P.3d 973, 981 (2005).

Nationwide, many states disallow diminished capacity defenses. See Comment Note, *Mental or Emotional Condition as Diminishing Responsibility for Crime*, 22 A.L.R.3d 1228, at § 3 (Supp. 2012)

(collecting cases). The American Bar Association's reference manual on criminal mental health evidence law notes that "[a]lmost no jurisdictions have the traditional diminished capacity defense anymore . . . ." Parry, *supra*, § 4.04 at 138. Even so, "[n]early half of the state criminal codes provide either that intoxication is a defense if it negatives a mental state or that it is admissible in evidence whenever relevant to negate an element of the offense charged." W. LaFave, *Substantive Criminal Law* § 9.5(a), at 43 n.8 (2d ed. 2003) (citing statutes); see also *Montana* v. *Egelhoff*, 518 U.S. at 47-48 (observing that by the end of the 19th century and continuing on to the present, "in most American jurisdictions, intoxication could be considered in determining whether a defendant was capable of forming the specific intent necessary to commit the crime charged"); R. W. Gascoyne, Annotation, *Modern Status of the Rules as to Voluntary Intoxication as Defense to Criminal Charge*, 8 A.L.R.3d 1236, § 4 (2013) (collecting cases).

These States have decided as a matter of policy that voluntary-intoxication evidence may create a significant question of fact of the jury, requiring thoughtful analysis by a jury presented with enough information to conduct a thoughtful analysis: "[W]hen a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question whether the accused is in such a condition of mind, by reason of drunkenness or otherwise, as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury." *Hopt* v. *People*, 104 U.S. 631, 634 (1881).

Other states, however, have adopted the view that evidence of voluntary intoxication is never admissible, even when it demonstrates the absence of a specific intent or knowledge element of a crime. LaFave, *supra*, § 9.5(a), at 46 & n.25 (citing cases and statutes); see also *Montana* v. *Egelhoff*, 518 U.S. at 48 & n.2 (citing cases and statutes). This absence of uniformity in definition, recognition, and availability of mental state defenses demonstrates the futility of tying constitutional doctrine to state definitions and labels.

4. Even the semantics attached to mental defenses defy consistency of use and meaning. For example, defining the phrase "mental disease" is anything but simple. One commentator reports how a hospital classified the diagnosis of "sociopathic personalities:" "First it was not a mental illness and then, following a weekend staff meeting, it was." Lawrence P. Tiffany & Mary Tiffany, *The Legal Defense of Pathological Intoxication* 210 (1990).

Unsurprisingly, the phrase, "mental disease or defect" has been subject to different interpretations by different states. See, *e.g.*, *Arnold* v. *Commonwealth*, 192 S.W.3d 420, 424 n.1 (Ky 2006) (agreeing that defense of voluntary intoxication falls within ambit of state rule permitting "expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing upon the issue of his or her guilt or punishment"); *State* v. *Galloway*, 133 N.J. 631, 642, 628 A.2d 735, 741 (1993) (describing how New Jersey courts interpret "mental disease or defect" broadly: "Forms of psychopathology other than clinically-defined mental diseases or defects may affect the mental

process and diminish cognitive capacity, and therefore may be regarded as a mental disease or defect in the statutory or legal sense."); *Commonwealth* v. *Harvey*, 397 Mass. 803, 807 & n.2, 494 N.E.2d 382, 385 & n.2 (1986) (holding that the State's "mental disease or defect" rule applied where the defense offered psychiatric evidence that "the defendant did not possess the mental capacity to 'deliberately evaluate the pros and cons of carrying out an aggressive act like murder'" because of drug and alcohol use, even though this was not "the traditional defense of lack of criminal responsibility").

The nuances and variations of States' approaches to mental status defenses highlight the core argument advanced by Amici States. That is, the scope of the privilege against self-incrimination should not depend on how state law classifies a mental defense for purposes of ordering the defendant to submit to an evaluation. Rather it should turn on whether the defense produces expert testimony that places the contents of a court-ordered mental evaluation at issue in the case. See, *e.g.*, *Lewis v. State*, 195 P.3d at 633-634.

5. Finally, Kansas law excluding voluntary intoxication from the rubric of mental capacity defenses likely was not intended as a tool to assist defendants defend more effectively against criminal charges. See *Montana* v. *Egelhoff*, 518 U.S. at 49-50 (observing that disallowing evidence of voluntary intoxication on issue of *mens rea* "has the effect of increasing the punishment for all unlawful acts," ensures "that those who prove incapable of controlling violent impulses while voluntarily

intoxicated go to prison," and holds responsible those who impair their own faculties). Yet the Kansas Supreme Court held that Cheever should have been able to exercise his Fifth Amendment privilege more expansively precisely because the State's rules narrowed the meaning and availability of the voluntary intoxication defense. Because the State did not recognize Cheever's defense as a mental capacity defense, held the court, he should have been permitted to advance it without concern that the prosecution would present in-kind rebuttal evidence.

Thus, if the lower court's opinion were affirmed, the scope of the Fifth Amendment would depend upon mental defense labels and definitions set forth by individual state laws, and defendants would have an incentive to "game the system" by carefully circumscribing their mental defenses to avoid Fifth Amendment "waivers" while preserving the admissibility of their own expert's testimony. This result would be unjust, inimical to the truth-finding process, and at odds with a consistent application and coherent interpretation of the Constitution.

CONCLUSION

The judgment of the Supreme Court of Kansas should be reversed.

Respectfully submitted,

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Dated: May 20, 2013

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-609

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IN THE

Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

vs.

SCOTT D. CHEEVER,

Respondent.

On Writ of Certiorari to the Supreme Court of Kansas

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

When a criminal defendant asserts a mental-status defense and offers evidence to support that defense at trial, including expert testimony based on an examination of the defendant, does the State violate the defendant's Fifth Amendment privilege against self-incrimination by rebutting the defense with evidence from a court-ordered mental evaluation?

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IN THE

Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

vs.

SCOTT D. CHEEVER,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In this case, the Kansas Supreme Court has misinterpreted the Fifth Amendment in a manner that would

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1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

permit defendants to present to juries a skewed version of the facts, distorting the truth-finding function of trials and leading to more miscarriages of justice. Specifically, in any case where a defendant claims a mental impairment short of a "disease or defect," the defendant would be able to put on expert testimony based on a mental evaluation of the defendant, while the prosecution would be barred from countering this testimony with its own evaluation. This would include cases such as the present case, where the defendant's claimed impairment is the result of his own voluntary intoxication. Such a distortion of the truth is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Scott Cheever was a methamphetamine cooker, as well as a user of that drug. On January 19, 2005, Cheever shot and killed Greenwood County Sheriff Matthew Samuels, who was serving a warrant for his arrest, and he also shot at four other law enforcement officers. See *State* v. *Cheever*, 295 Kan. 229, 233, 284 P. 3d 1007, 1014 (2012).

The State of Kansas began prosecution in state court. However, the Kansas Supreme Court in another case erroneously declared the state's death penalty to be unconstitutional. See *State* v. *Marsh*, 278 Kan. 520, 102 P. 3d 445 (2004), rev'd and remanded by *Kansas* v. *Marsh*, 548 U. S. 163 (2006). In the interval between the erroneous decision and its correction by this Court, the state proceedings were dismissed, and a federal prosecution was commenced. See *Cheever*, 295 Kan., at 235, 284 P. 3d, at 1015.

In federal court, Cheever gave notice pursuant to Federal Rule of Criminal Procedure 12.2(b) that he intended to introduce expert evidence that his metham-

phetamine intoxication impaired his ability to form the mental state required for the crime, and the district court ordered an examination pursuant to subdivision (c) of that rule. See Brief for Petitioner 4. "As a result of that order, Cheever submitted to examination by [Dr. Michael] Welner. Welner's interview of Cheever lasted 5 and 1/2 hours, was videotaped, and resulted in a 230-page transcript." *Cheever*, 295 Kan., at 235, 284 P. 3d, at 1015.

The federal case was suspended when defense counsel was unable to proceed, and it was subsequently dismissed. See *ibid.* The state case was refiled, see *ibid.*, the state's death penalty having been restored by this Court in the interim.

Cheever introduced expert testimony in the state case, as he had planned to do in the federal case. His expert, Dr. Roswell Lee Evans, Jr., a doctor of pharmacy, had examined Cheever as part of the basis of his testimony. Just as Dr. Welner had done, he interviewed Cheever for multiple hours. See J. A. 35. "With respect to shooting Samuels, Evans testified that there 'was no judgment. There was no judgment at all. This man just did it.'" *Cheever*, 295 Kan., at 237, 284 P. 3d, at 1016.

Dr. Welner testified in rebuttal, including a detailed examination of Cheever's actions during the crime. "Welner told the jury that Cheever had the ability to control his actions, he had the ability to think the matter over before he shot Samuels, and he had the ability to form the intent to kill." *Id.*, at 238, 284 P. 3d, at 1017.

The Kansas Supreme Court reversed on the ground that the Fifth Amendment only permits compelled mental examinations to be introduced as evidence if the defendant makes a "mental disease or defect" defense.

> "Accordingly, we find that Cheever's evidence showed only that he suffered from a temporary mental incapacity due to voluntary intoxication; it was not evidence of a mental disease or defect within the meaning of K.S.A. 22-3220. Consequently, Cheever did not waive his Fifth Amendment privilege and thus permit his court-ordered examination by Dr. Welner to be used against him at trial. Therefore, we conclude that allowing Welner to testify in rebuttal to the voluntary intoxication defense violated Cheever's constitutional rights under the Fifth and Fourteenth Amendments to the United States Constitution." *Id.*, at 251, 284 P. 3d, at 1024.

This Court granted certiorari, limited to this question.

SUMMARY OF ARGUMENT

In *Buchanan* v. *Kentucky*, this Court distinguished *Estelle* v. *Smith* and held that introduction of a compelled psychological examination was consistent with the Fifth Amendment when the defendant had introduced his own mental evidence to support a claim of "extreme emotional disturbance." This holding was based on the defendant's introduction of evidence and not on classification of his defense as a "mental disease or defect," a classification the Kansas Supreme Court deemed essential. The underlying policy of the *Buchanan* rule is one of fair access to evidence, not classification of defenses. The defendant has access to essential evidence in that his expert can conduct a mental examination, and the prosecution must have comparable access to protect the integrity of the truth-finding function of the trial.

Although the rule is well established, the constitutional justifications for it have been sparse. *Amicus*

suggests that the rule is analogous to the rule that a defendant who chooses to testify cannot refuse to submit to cross-examination. *Estelle* v. *Smith* rejected the idea that submitting to a mental examination is nontestimonial. Hence, a defendant who submits to such an examination by his own expert, who then testifies at trial, has chosen to be a witness in his own case to a limited extent. By analogy to the cross-examination rule, the choice to be a witness in the mental examination context includes examination by the other side's expert as an inseparable part of the package.

ARGUMENT

I. Fair access to evidence, not a particular type of defense, is the basis of the *Buchanan* rule.

In *Estelle* v. *Smith*, 451 U. S. 454, 465-466 (1981), the Court held that the use of psychiatric testimony based on an interview with the defendant violated the Fifth Amendment in the circumstances of that case, but it took care to distinguish a different situation:

> "Nor was the interview analogous to a sanity examination occasioned by a defendant's plea of not guilty by reason of insanity at the time of his offense. When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case. Accordingly, several Courts of Appeals have held that, under such circumstances, a defendant can be required to submit to a sanity examination conducted by the prosecution's psychiatrist. [Citations.]

> "Respondent, however, introduced no psychiatric evidence, nor had he indicated that he might do so."

Buchanan v. *Kentucky*, 483 U. S. 402, 423 (1987), "present[ed] one of the situations that we distinguished from the facts in *Smith*." Buchanan asserted a defense of "extreme emotional disturbance." See *ibid.* If established, this partial defense would reduce the crime from murder to manslaughter. See *id.*, at 406, n. 3. It is not a mental defense as such but rather a modern replacement for the problematic concepts that traditionally distinguished the two main degrees of homicide. See *Gall* v. *Commonwealth*, 607 S. W. 2d 97, 108 (Ky. 1980), overruled on other grounds, *Payne v. Commonwealth*, 623 S. W. 2d 867, 870 (Ky. 1981) (describing change); see also *Patterson* v. *New York*, 432 U. S. 197, 207 (1977). Buchanan introduced psychological reports in support of this defense, and the Commonwealth introduced another psychological report from an earlier examination for the purpose of involuntary commitment. See *Buchanan*, *supra*, at 423, and n. 20.

What the *Buchanan* opinion does not say may be as important as what it says. The *Buchanan* Court placed no emphasis on the nature of the defense involved. The Court saw no need to go into a discourse as to whether the new defense was classifiable as a mental disease or defect. The Court referred to it broadly as a " 'mental status' defense," with no indication such defenses need to be classified in any detail, and no indication that there is a constitutional distinction between transient and chronic conditions. See 483 U. S., at 423; cf. *State* v. *Cheever*, 295 Kan., at 251, 284 P. 3d, at 1024. The dispositive fact was that the defendant had introduced psychological evidence. "In such circumstances, with petitioner not taking the stand, the Commonwealth

could not respond to this defense unless it presented other psychological evidence." 483 U. S., at 423.

The essential problem here is the unfairness and the threat to the truth-finding function of allowing one side to have access to essential evidence, picking and choosing which elements to present, while the other side is denied access and kept in the dark. The more thoughtful opinions applying *Smith* and *Buchanan* have regularly cited this unfairness and the integrity of the fact-finding process as primary concerns. See, *e.g.*, *Pope* v. *United States*, 372 F. 2d 710, 720-721 (CA8 1967) (en banc), vacated and remanded on other grounds, 392 U. S. 651 (1968); *United States* v. *Byers*, 740 F. 2d 1104, 1113 (DC Cir. 1984) (plurality opinion); *Blaisdell* v. *Commonwealth*, 372 Mass. 753, 766, 364 N. E. 2d 191, 200 (1977) ("so that the jury might have the benefit of countervailing expert views, based on similar testimonial statements of a defendant").

This rule may be seen as part of an overall policy to avoid at least the grossest disparities in the parties' access to evidence. The prosecution must disclose material exculpatory evidence in its possession. See *Strickler* v. *Greene*, 527 U. S. 263, 280-281 (1999). Under typical discovery rules, the defendant has the right to inspect documents, tangible objects, and tests in the prosecution's possession, see Fed. Rule Crim. Proc. 16(a)(1)(E) and (F), and to exercise that right he must grant reciprocal access. See Fed. Rule Crim. Proc. 16(b)(1)(A) and (B).

In the evolution of Rule 12.2 of the Federal Rules of Criminal Procedure, we can see the recognition that parity of access, not nature of the defense, is the key consideration. The history is presented in Criminal Justice Legal Foundation, History of Rule 12.2 of the Federal Rules of Criminal Procedure (2013), available at http://www.cjlf.org/pubs/Rule12.2.pdf. As originally

promulgated by the Court in 1974, even before *Smith*, the rule required notice to the prosecution of either an insanity defense (subd. (a)) or a defense of a mental disease or defect inconsistent with the *mens rea* of the crime (subd. (b)), and it provided for a psychiatric examination on the motion of the government (subd. (c)). See *id.*, at 1. Congress added problematic language saying that the defendant's statements in the examination were not admissible on "the issue of guilt," but of course the *mens rea* element of guilt was the whole point of the examination in a case under subdivision (b).

In 1983, the language about other conditions was extended beyond the mental state required for the offense to any condition "bearing upon the issue of his guilt." See *id.*, at 7. The Advisory Committee Note confirms that the intent was to broaden the rule to "all circumstances in which the defendant intends to offer expert testimony regarding his mental condition at the time of the crime charged . . . ." See *id.*, at 8. The problematic language about inadmissibility on the issue of guilt was changed to make the defendant's statements in the examination inadmissible on issues other than mental condition.

In the 2002 rewrite, the rule was further broadened to expressly include evidence in the penalty phase of a capital case. See *id.*, at 13. Because of the wide-open rules in these proceedings, the defendant can introduce any mental condition he chooses, far beyond diagnosable mental disorders. See, *e.g.*, *People* v. *San Nicolas*, 34 Cal. 4th 614, 672-673, 101 P. 3d 509, 549 (2004) (lack of emotional maturity). Doing so triggers the notice and examination requirements of Rule 12.2, as amended. Yet the constitutionality of the expansion of Rule 12.2 to this evidence was so clear that the change was not even controversial. See Judicial Conference of

the United States, Report of the Advisory Committee on Criminal Rules, Appendix C, Summary of Public Comments on Substantive Amendments (May 10, 2001), available at http://www.us.courts.gov/uscourts/RulesAndPolicies/rules/Reports/CR05-2001.pdf (pages 321-322 of the PDF file).

Since it was first enacted nearly four decades ago, the federal rule has extended beyond mental defenses as such to include psychologically-based claims that the defendant lacks the *mens rea* required for the crime, whether based on a "mental disease or defect" or not. Many state rules are similarly extensive, although some states do limit them to mental defenses. See 5 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 20.5(c), p. 480 (3d ed. 2007). If the Kansas Supreme Court were correct that the Fifth Amendment is violated by the use in evidence of a required psychological examination when the defendant does not make a "mental disease or defect" defense as such, then the federal rule and all of the comparably extensive state rules would be unconstitutional. Yet these attacks have been uniformly rejected. See 1A C. Wright & A. Leipold, Federal Practice and Procedure § 205, pp. 480-482, and n. 13 (4th ed. 2008); LaFave, *supra*, § 20.4(e), p. 462, n. 78.

The unfairness of only one side having access to a full mental examination, which necessarily includes the participation of the subject, does not depend on the classification of the defense being asserted by the defendant. The *Buchanan* rule cannot be so limited.

An additional policy consideration warrants mention here. Cheever's defense was that he was too intoxicated to form the requisite mental state. *Montana* v. *Egelhoff*, 518 U. S. 37 (1996), established that the legislature can forbid this defense altogether, if it chooses to do so. See *id.*, at 56 (plurality opinion); *id.*, at 56-57

(Ginsburg, J., concurring in the judgment). The defense is usually, if not always, bogus. See *id.*, at 50-51 (plurality opinion); Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Montana* v. *Egelhoff*, No. 95-566, pp. 8-13. If the prosecution is unfairly handicapped in its ability to refute this dubious defense, the case for banning it altogether is markedly strengthened. Although *amicus* CJLF favors such a ban, we believe the decision should be considered on its intrinsic merits. States that wish to keep the defense and decide its validity in individual cases should not be forced to choose between complete abolition and a procedure that unfairly tilts the process in favor of the defendant. Cf. *Patterson* v. *New York*, 432 U. S., at 207-208.

Yet policy considerations alone would not authorize a court to carve out an exception that the Constitution does not authorize. See *Davis* v. *Washington*, 547 U. S. 813, 832-833 (2006). The explanations offered for the *Buchanan* rule have been less than convincing. See *Byers*, 740 F. 2d, at 1114. To this question we now turn.

II. A defendant who chooses to introduce expert testimony based on a mental examination has chosen to "be a witness" to that extent, analogous to taking the stand.

The plurality opinion in *United States* v. *Byers*, 740 F. 2d 1104, 1111-1113 (DC Cir. 1984), reviewed the justifications for compelled mental examinations and found them all wanting. The "nontestimonial" explanation was rejected in *Estelle* v. *Smith*, 451 U. S. 454, 463-465 (1981). A distinction based on a belief that the Fifth Amendment privilege does not extend to issues of sanity is also no longer sustainable, if it ever was. See *Byers*, *supra*, at 1112.

That leaves "waiver" and its variants. The *Byers* plurality notes,

> "It seems to us at best a fiction to say that when the defendant introduces his expert's testimony he 'waives' his Fifth Amendment rights. What occurs is surely no waiver in the ordinary sense of a known and voluntary relinquishment, but rather merely the product of the court's decree that the act entails the consequence—a decree that remains to be justified." 740 F. 2d, at 1113.

Even so, waiver has become the predominant explanation in the years since. In *Powell* v. *Texas*, 492 U. S. 680, 683-684 (1989), the Court explained (emphasis added):

> "The principal support found in the Court of Criminal Appeals' decision for the proposition that petitioner waived the right to object to the State's use of the Coons and Parker testimony is the Fifth Circuit's opinion in *Battie* v. *Estelle*, 655 F. 2d 692 (1981). In that case, the Court of Appeals suggested that if a defendant introduces psychiatric testimony to establish a mental-status defense, the government may be justified in also using such testimony to rebut the defense notwithstanding the defendant's assertion that the psychiatric examination was conducted in violation of his right against self-incrimination. *Id.*, at 700-702. In such circumstances, the defendant's use of psychiatric testimony might constitute a waiver of the Fifth Amendment privilege, *just as the privilege would be waived if the defendant himself took the stand. Id.*, at 701-702, and n. 22. The Court of Appeals explained that 'any burden imposed on the defense by this result is justified by the State's overwhelming difficulty in responding to the defense psychiatric testimony without its own psychiatric examination of the

> accused and by the need to prevent fraudulent mental defenses.' *Id.*, at 702 (footnote omitted).
>
> "Language contained in *Smith* and in our later decision in *Buchanan* v. *Kentucky*, 483 U. S. 402 (1987), provides some support for the Fifth Circuit's discussion of waiver. In *Smith* we observed that '[w]hen a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he has interjected into the case.' 451 U. S., at 465. And in *Buchanan* the Court held that if a defendant requests a psychiatric examination in order to prove a mental-status defense, he waives the right to raise a Fifth Amendment challenge to the prosecution's use of evidence obtained through that examination to rebut the defense. 483 U. S., at 422-423."

The analogy to the defendant taking the stand is indeed the correct way to view this situation, *amicus* submits. However, we would view that situation not as a waiver but rather as a defendant *choosing* to be a witness and not being *compelled* to be a witness, which is what the Fifth Amendment actually protects against. When a defendant chooses to be a witness, his constitutional right not to be compelled to be a witness remains intact, neither waived nor violated.

As we explain in more detail in our brief in *Salinas* v. *Texas*,[2] the choice to be a witness or not be a witness is a binary one. A defendant who chooses to be a witness on direct examination cannot refuse cross-examination. "The immunity from giving testimony is

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2. Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Salinas* v. *Texas*, No. 12-246, available at http://www.cjlf.org/briefs/SalinasG.pdf.

one which the defendant may waive by offering himself as a witness." *Raffel* v. *United States*, 271 U. S. 494, 496 (1926). "His waiver is not partial; having once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or embarrassing." *Id.*, at 497. "*The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do.*" *Id.*, at 499 (emphasis added).

From *Estelle* v. *Smith*'s rejection of the idea that participation in a mental examination is nontestimonial, it follows that a defendant who is examined by his own expert and introduces that expert's testimony based on the examination has chosen to become a witness in his own behalf to a limited extent. Just as with a decision to testify in person at trial, he has to that extent "cast aside the cloak of immunity."

Examination by an expert appointed by the court or designated by the prosecution is analogous to cross-examination. It is part of the package that the defendant must accept when he chooses to be a witness to the extent of introducing his own expert's examination-based testimony.

In the present case, Cheever *chose* to be a witness in his own case, and was not *compelled* to be one, when he submitted to a mental examination by his own expert and introduced that expert's testimony. See J. A. 35 (defense expert examined defendant).[3] Introduction of testimony based on a court-ordered examination therefore does not violate the Fifth or Fourteenth Amendments to the Constitution of the United States.

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3. Defendant further chose to be a witness by testifying, but this Court declined to consider the implications of that aspect of this case when it limited the grant of certiorari to Question 1, so *amicus* CJLF will not brief it.

CONCLUSION

The decision of the Supreme Court of Kansas should be reversed.

May, 2013

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 12-609

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IN THE

Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

—v.—

SCOTT D. CHEEVER,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF KANSAS

BRIEF FOR THE JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

When a criminal defendant affirmatively introduces expert testimony that he lacked the requisite mental state to commit capital murder of a law enforcement officer due to the alleged temporary and long-term effects of the defendant's methamphetamine use, does the State violate the defendant's Fifth Amendment privilege against self-incrimination by rebutting the defendant's mental state defense with evidence from a court-ordered mental evaluation of the defendant?

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INTEREST OF AMICUS CURIAE

The Judge David L. Bazelon Center for Mental Health Law is a national non-profit advocacy organization that provides legal assistance to individuals with mental disabilities.[1] The Center was founded in 1972 as the Mental Health Law Project. Through litigation, policy advocacy, education, and training, the Center works to promote the rights of individuals with mental disabilities to participate equally in society. The Center has filed briefs with the Court in most of its cases concerning the rights of individuals with mental disabilities as well as other important topics.[2]

This case presents the Court with an opportunity to clarify the concept of waiver in the context of the Fifth Amendment privilege against compelled self-incrimination. Here, the Kansas Supreme Court correctly held that admission of Scott Cheever's compelled psychiatric examination violated his privilege against self-incrimination—a privilege it held he did not forfeit merely by undertaking to defend the charges against him with evidence going to his mental state at the time of the crime. If Petitioner's challenge pre-

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[1] All parties have consented to the filing of this brief through universal letters of consent on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no person other than amicus made a monetary contribution intended to fund the preparation and submission of this brief.

[2] *See, e.g., Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n*, 132 S. Ct. 694 (2012); *Brown v. Plata*, 131 S. Ct. 1910 (2011); *Clark v. Arizona*, 548 U.S. 735 (2006); *Barnhart v. Walton*, 535 U.S. 212 (2002).

vails, a defendant who seeks to assert a mental status defense will be presented with the intractable choice of either (1) not introducing expert testimony in support of that defense, and thus effectively abandoning it at trial, or (2) offering such testimony, but at the cost of being compelled to undergo a psychiatric interview, and risking the government's use of any statements made during that interview against the defendant himself. That is no choice at all, and certainly not one that comports with the fundamental right not to be compelled to become a witness against oneself.

Defendants suffering from mental health problems should not have to choose between their right to raise a credible mental status defense and their privilege against self-incrimination. Imposition of that no-win decision on an individual who wants to raise an affirmative defense disserves the interests enshrined in the Fifth Amendment.

The Bazelon Center takes a special interest in this case as it presents an issue on which Judge Bazelon, its namesake, himself opined in the prominent case of *United States v. Byers*, 740 F.2d 1104 (D.C. Cir. 1984) (en banc). In *Byers*, the District of Columbia Circuit held that when a defendant asserts and supports through expert testimony an insanity defense, the Fifth Amendment is not violated by a government psychiatrist's testimony about statements made by the defendant during a court-ordered examination. In dissent, Judge Bazelon maintained that such an examination "implicates all of the fundamental values that lie at the heart of the Fifth Amendment." *Id.* at 1150-51 (Bazelon, J., dissent-

ing). Indeed, the Judge contended that the prospect of that examination places the defendant "into precisely that situation which the privilege is designed to prevent," that is, the "cruel trilemma" of "confessing responsibility, feigning insanity or forfeiting the affirmative defense." *Id.* at 1153-54. Judge Bazelon reasoned that the mandatory trade-off between raising the defense and the compelled interview violated the Self-Incrimination Clause, even if certain safeguards might be adopted to lessen the tension. *Id.* at 1155-59.

SUMMARY OF ARGUMENT

Disclosures made by a defendant to a psychiatrist during a court-ordered examination are protected by the Fifth Amendment privilege against self-incrimination. Any waiver of this constitutional right must be knowing, intelligent, and voluntary. Absent waiver, a defendant's statements may not be used against him. There is no precedent or historical basis for the proposition that a defendant waives this right by raising a mental status defense and introducing supporting expert psychiatric testimony.

Petitioner seeks to put the defendant in the impossible position of mounting a defense and forfeiting his constitutional right not to incriminate himself *or* dropping the defense altogether. That argument rests upon the untenable "fiction" that a defendant "waives" his Fifth Amendment right when he invokes his constitutionally protected right to assert a defense—here, lack of premeditation due to voluntary intoxication. But that posi-

tion is insupportable as a strict matter of doctrine. "What occurs is surely no waiver in the ordinary sense of a known and voluntary relinquishment . . . [as] his acceptance of it could hardly be called unconstrained." *United States v. Byers*, 740 F.2d 1104, 1113 (D.C. Cir. 1984) (en banc) (plurality opinion) (Scalia, J.).

There was no true waiver in this case. Cheever's purported relinquishment of his right against self-incrimination was not intelligent or knowing—and in particular, it was not voluntary. Rather, his "choice" had heavy strings attached, strings that eventually proved "devastating" to his defense. Cheever should not have been subject to that dilemma, which violated his Fifth Amendment rights.

ARGUMENT

INTRODUCTION OF A MENTAL STATUS DEFENSE AND SUPPORTING EXPERT TESTIMONY DOES NOT CONSTITUTE A WAIVER OF THE PRIVILEGE AGAINST SELF-INCRIMINATION.

A. The Origin And Purpose Of The Fifth Amendment's Privilege Against Compulsory Self-Incrimination.

The Fifth Amendment guarantees that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The Court has recognized this right as "the mainstay of our adversary system of criminal justice." *Michigan v. Tucker*, 417 U.S. 433, 439 (1974)

(quotation omitted). Indeed, it is "one of the great landmarks in man's struggle to make himself civilized." *Id.* (quoting *Ullmann v. United States*, 350 U.S. 422, 426 (1956)).

The common-law privilege against self-incrimination arose as a response to "certain historical practices, such as ecclesiastical inquisitions and the proceedings of the Star Chamber, 'which placed a premium on compelling subjects of the investigation to admit guilt from their own lips.'" *Andresen v. Maryland*, 427 U.S. 463, 470 (1976) (quoting *Tucker*, 417 U.S. at 440). Those practices subjected defendants to the "cruel trilemma of self-accusation, perjury or contempt." *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 55 (1964). Over time, the idea of prosecution based on compelled confession became "so odious" as to "give rise to a demand for [its] total abolition," leading to a fundamental change in English criminal procedure. *Brown v. Walker*, 161 U.S. 591, 596-97 (1896). And when it came to establishing criminal procedure in this country, these inequities had so deeply "impress[ed] themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law . . . clothed in this country with the impregnability of a constitutional enactment"—namely, the Fifth Amendment. *Id.* at 597.

The privilege against self-incrimination protects some of our society's most deeply held values, *see Murphy*, 378 U.S. 52, among them a deep reluctance to force individuals to supply the evidence of their own guilt from their own lips. Indeed, the Amendment itself speaks in terms of a prohibition

on compulsion. U.S. CONST. amend. V; *see also Culombe v. Connecticut*, 367 U.S. 568, 602 (1961) ("The ultimate test [for the Fifth Amendment] remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness.").

Reflecting the importance of this value, the Court has spread the reach of the privilege far beyond the confines of the courtroom. *Tucker*, 417 U.S. at 440 ("Although the constitutional language in which the privilege is cast might be construed to apply only to situations in which the prosecution seeks to call a defendant to testify against himself at his criminal trial, its application has not been so limited."); *Miranda v. Arizona*, 384 U.S. 436, 467 (1966). The Court has clearly established that the privilege extends to statements made during a court-ordered psychiatric examination. *Estelle v. Smith*, 451 U.S. 454, 464-69 (1981); *see also Byers*, 740 F.2d at 1112-13.[3] Such statements, despite not being made in the courtroom itself and being conveyed through the mouth of another, so implicate the values underlying the privilege that they must be similarly protected. *See Byers*, 740 F.2d at 1151 (Bazelon, J. dissenting).

Thus, absent a legitimate waiver, the introduction at trial of statements made by the defendant during a court-ordered psychiatric examination violates a critical value that the Fifth Amendment was designed to preserve and that the Court has

[3] There has been no serious contention to the contrary during these proceedings; indeed, Petitioner itself agrees that Cheever had a "Fifth Amendment privilege with respect to the mental examination." *See* Petr. Br. at 29.

since consistently and fervently endeavored to protect.

B. Any Waiver Of The Privilege Must Be Voluntary, Knowing, And Intelligent.

"To establish a valid waiver, the State must show that the waiver was knowing, intelligent, and voluntary under the 'high standar[d] of proof for the waiver of constitutional rights [set forth in] *Johnson v. Zerbst.*'" *Maryland v. Shatzer*, 559 U.S. 98, 104 (2010) (alteration in original) (quoting *Johnson v. Zerbst*, 304 U.S. 458 (1938)). This strict standard is particularly important in the criminal context, as it ensures that a defendant is "accorded the greatest possible opportunity to utilize every facet of the constitutional model of a fair criminal trial." *Schneckloth v. Bustamonte*, 412 U.S. 218, 241 (1973). Conversely, "[a]ny trial conducted in derogation of that model leaves open the possibility that the trial reached an unfair result precisely because all the protections specified in the Constitution were not provided." *Id.* As the Court has repeatedly recognized, the required showing that the defendant has freely relinquished his privilege is a "heavy burden" that rests squarely with the government. *See, e.g.*, *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2268 (2010) (quoting *Miranda*, 384 U.S. at 475).

The clearest and simplest method of effectuating a waiver is, of course, for the defendant expressly to announce his intention to relinquish the right at issue—as, for example, occurs in a guilty plea colloquy. *See* Fed. R. Crim. P. 11. Alternately, and more relevant in this context, the law may presume that "an individual who, with a full under-

standing of his or her rights, acts in a manner *inconsistent with* their exercise has made a deliberate choice to relinquish the protection those rights afford." *Berghuis*, 130 S. Ct. at 2262 (emphasis added). In *Berghuis*, for example, the act giving rise to the "inconsisten[cy]" was the defendant's decision to respond to police interrogation. The Court held that where *Miranda* warnings were given and understood, an accused's uncoerced statement established an "implied waiver" of his right to remain silent. *See id.* at 2260-62.

The voluntary nature of an act of waiver, however, may not be lightly presumed. To be voluntary, a waiver of a constitutional right must be "the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Moran v. Burbine*, 475 U.S. 412, 421 (1986). This high standard naturally flows from the importance of the values animating the Fifth Amendment; to require any less would be to demean a privilege that the Court itself has fought to safeguard and strengthen since its inception.

C. Introduction Of A Mental Status Defense And Supporting Expert Testimony Does Not Give Rise To A Voluntary Waiver

As a strict doctrinal matter, the introduction of a mental status defense, along with supporting expert testimony, should not constitute a waiver of the right against self-incrimination. It is plainly not a "free and unconstrained" choice to abandon the privilege. *Culombe*, 367 U.S. at 602. Nor is the defendant undertaking any act that is inconsistent with the privilege's retention.

Faced with a factually identical situation, two current Members of this Court previously acknowledged that "[i]t seems . . . at best a fiction to say that when the defendant introduces his expert's testimony he 'waives' his Fifth Amendment rights." *Byers*, 740 F.2d at 1113 (plurality opinion) (Scalia, J., joined by Ginsburg, J.). The reasons are plain. The defendant who wishes to raise a mental status defense is not voluntarily relinquishing anything. If he must be subjected to a court-ordered examination, it is not because he has chosen that outcome in any meaningful sense, but rather only because it is "the court's decree that the act" (i.e., introducing his own expert testimony) "entails the consequence" (i.e., that he must be examined). *Id.* And that is a "decree that remains to be justified." *Id.*

Moreover, there is an independent reason to reject the "fiction" of waiver here. The Court has held that in situations where two different constitutional rights are at issue, it is "intolerable that one constitutional right should have to be surrendered in order to assert another." *Simmons v. United States*, 390 U.S. 377, 393-94 (1968). Accordingly, merely because a defendant decides to present exculpatory evidence at trial—indisputably a fundamental right, *see Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)—he should not thereby sacrifice his right against self-incrimination.

The main response of Petitioner and its amici to this argument is to analogize the instant case to the situation in which a defendant takes the stand in his own defense and thereby subjects himself to compulsory cross-examination. *See* Pet. Br. at 22-24. They observe that no constitutional violation

inheres in the latter scenario, despite the fact that the choice to testify leads automatically to a process that may elicit incriminating statements from the defendant's own mouth. *See Brown v. United States*, 356 U.S. 148 (1958). Although they argue that the same should be true here, the analogy is flawed in at least two respects.

First, the reason that testifying is deemed to constitute a waiver of the privilege against self-incrimination is that it is an act "inconsistent with" the invocation of that right. Had the defendant decided to remain silent, the prosecution could not force him to testify in any manner. As the United States points out, the Self-Incrimination Clause provides the defendant with a right not even to be sworn as a witness at his own trial. *See* U.S. Br. at 13 (citing *Wilson v. United* States, 149 U.S. 60, 66 (1893)). Once he *chooses* to testify, on the other hand, he makes himself into a witness and therefore necessarily relinquishes the right. *See Brown*, 356 U.S. at 155-56 ("He cannot reasonably claim that the Fifth Amendment gives him not only this choice [to not testify] but, if he elects to testify, an immunity from cross-examination on the matters he himself has put in dispute."); *accord Mitchell v. United States*, 526 U.S. 314, 322 (1999). It is inconsistent to elect to speak and yet also to insist that one cannot be compelled to answer questions. *See Berghuis*, 130 S. Ct. at 2262.[4]

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[4] As Cheever argues, this idea is reflected in the text of the Fifth Amendment itself. The Amendment provides that the accused cannot be "compelled . . . to be a witness " Resp. Br. 34 (quoting U.S. Const. amend. V). But if he chooses to testify, then he has decided on his own to "be a witness."

That "inconsisten[cy]" is not present here. A defendant who seeks to introduce mental status evidence does not thereby automatically decide to become a witness. He may choose not to testify at all, and even if he offers expert testimony, the expert need not relate any of the defendant's actual statements in order to convey his own expert opinion. (Indeed, it would be inadmissible hearsay for the expert to relate statements that were made to him for their truth.) To be sure, the expert may form his opinion *on the basis* of statements made to him by the defendant, but that is a far cry from introducing the statements themselves in his own defense—either directly or through the expert. Hence, the defendant has done nothing that is inconsistent with his decision not to talk.

Second, the burden associated with waiver is much greater in the context of a compelled psychiatric interview than in cross-examination. As Petitioner itself emphasizes, a testimonial waiver is not unlimited. The rule is that when a testifying defendant is questioned by the prosecutor, "the breadth of his waiver is determined by the scope of relevant cross-examination." Petr. Br. at 11 (quoting *Brown v. United States*, 356 U.S. 148, 154-55 (1958)) (emphasis omitted). Put simply, whatever topics the defendant has testified about, he may be questioned on the same. But as the record here indicates, there are no similar limitations on a court-ordered psychiatric interview. For example, although Cheever's expert did not introduce statements from Cheever, the government's expert did precisely that, telling the jury what he learned "in the interview . . . from him," J.A. 134, about the way Cheever viewed himself and charac-

terized his own motivations for the shooting. *See generally* Welsh S. White, *The Psychiatric Examination and the Fifth Amendment Privilege in Capital Cases*, 74 J. Crim. L. & Criminology 943, 962-63 (1983) [hereinafter White, *The Psychiatric Examination*] (comparing testimonial waiver with waiver by introduction of mental status). As the "price" of raising a mental status defense goes up, so does the degree to which the defendant's so-called "choice" is a constrained and no longer free one.[5]

Petitioner also argues that *Buchanan v. Kentucky*, 483 U.S. 402 (1987), settles the applicability of the waiver doctrine here. Petr. Br. at 22. There are, however, critical differences between the cases. In *Buchanan*, the defendant's counsel affirmatively joined in a motion for a psychiatric examination, *id.* at 424, and the state psychiatrist's report offered at trial contained no statements made by the defendant. *Id.* Here, on the other hand, Cheever did not volunteer for nor request a psychiatric examination; in fact, he took

[5] The burden of a psychiatric interview on Fifth Amendment rights is greater in other respects, as well. In conducting her interview, the psychiatrist is not constrained by time, counsel, the rules of evidence, a judge, or any other factor that may balance the interviewee's rights and interests. *See* White, *The Psychiatric Examination* at 962-63. Moreover, as Judge Bazelon explained, techniques employed by psychiatrists during compelled examinations may "uncover aspects of the personality which the individual ordinarily does not reveal to others and which he may not consciously perceive. The information elicited—thoughts, dreams, fantasies, anxieties—is often that which the conscious mind tries to repress." *Byers*, 740 F.2d at 1151 (Bazelon, J., dissenting).

exception to it when confronted with the federal disclosure requirement. Rather, he was compelled by court order to submit to an examination that was not limited to probing his voluntary intoxication defense, and resulted in statements being offered at trial on subjects beyond which he or his expert testified, all as a consequence of having elected to assert a mental status defense. That is an untenable result, for as the Court observed in *Culombe*, "persons accused of crime cannot be made to convict themselves out of their own mouths." 367 U.S. at 571.

D. Cheever Did Not Voluntarily Waive His Privilege Against Self-Incrimination

The record indicates that the sole ground on which Cheever sought to defend himself was his mental state at the time of the crime. He did not deny that he shot Sheriff Matthew Samuels, nor that he did so intentionally. Tr. 99. His only defense was that his prolonged and contemporaneous use of methamphetamine negated his ability to act with premeditation, the necessary *mens rea* for capital murder. Toward that end, he testified as to his drug use and also called an expert who could speak about the properties of methamphetamine and its effect on Cheever. Without that evidence, it would have been exceedingly difficult for Cheever to mount his defense effectively. *See Ake v. Oklahoma*, 470 U.S. 68, 80 (1985) (highlighting importance of expert testimony in conveying to the jury the nature of a mental impairment).

In these circumstances, the "choice" available to Cheever was far from free and unconstrained. Rather, it came at a heavy price. By invoking his right to present that evidence, Cheever was compelled to trigger a chain reaction that ended with the government expert using Cheever's own answers not merely to rebut his defense, but affirmatively to establish his guilt. As the Kansas Supreme Court recognized, the overall effect was "devastating." Pet. App. 42. Had Cheever understood the consequences of his "choice," he may well not have chosen it in the first place. But more to the point, the disastrous consequences of Cheever's decision illustrate the extent to which his choice was not free and unconstrained in the first place. For that reason alone, the Fifth Amendment did not tolerate the government to take words Cheever was compelled to speak and use them against him to convict.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 12-609

IN THE

Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

SCOTT D. CHEEVER,

Respondent.

On Writ of Certiorari to the Supreme Court of Kansas

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL"), a non-profit corporation, works to advance the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing.[1] A professional bar association founded in 1958, NACDL's approximately 10,000 direct members in 28 countries—and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys—include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system.

NACDL has frequently appeared as *amicus curiae* before the United States Supreme Court, the federal courts of appeals, and the highest courts of numerous states. In particular, in furtherance of NACDL's mission to safeguard fundamental constitutional rights, the Association frequently appears as *amicus curiae* in cases involving the Fifth Amendment and its state analogues, speaking to the importance of balancing core constitutional protections with other constitutional and societal interests. As relates to the issues before the Court in this case, NACDL has an interest in protecting the rights of defendants to in-

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, their members, and counsel, made any monetary contribution towards the preparation and submission of this brief. Petitioner Kansas and Respondent Scott D. Cheever filed blanket consents to the filing of *amicus curiae* briefs, which were docketed on April 2, 2013, and April 3, 2013, respectively.

troduce mental-state evidence without waiving their privilege against compelled self-incrimination.

SUMMARY OF THE ARGUMENT

NACDL's members, who are in criminal trial courts across the country every day, provide a unique perspective on the State's efforts to rework Fifth Amendment waiver doctrine in this case. The State argues that any effort to present evidence to rebut the requisite mental state element operates as a *per se* and broad-scope waiver of the privilege against self incrimination. Such an expansive view has no foundation in this Court's precedents and would reverse the long-standing presumption against waivers. Moreover, forcing a defendant to choose between asserting a valid defense that he lacked the requisite intent and his right against self incrimination cannot in any respect be considered voluntary. *Brady* v. *United States*, 397 U.S. 742, 748 (1970).

This Court has accorded a defendant's Fifth Amendment privilege against self incrimination the most zealous protection, *Kastigar* v. *United States*, 406 U.S. 441, 445 (1972), requiring the prosecution to prove guilt independently. The State "may not by coercion prove its charge against an accused out of his own mouth." *Rogers* v. *Richmond*, 365 U.S. 534, 541 (1961). This privilege against compulsory self incrimination is so integral to our adversarial system that, absent a knowing, intelligent and voluntary waiver, a defendant *cannot* relinquish his Fifth Amendment rights. Because of the far-reaching consequences of waiver, "courts must 'indulge every reasonable presumption against waiver'" of this fundamental constitutional right. *Emspak* v. *United States*, 349 U.S. 190, 198 (1955) (quoting *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938)).

The State's claim that a defendant who chooses to argue that his mental state precluded him from having the requisite *mens rea* necessarily and voluntarily waives his right against self incrimination is inconsistent with the presumption against waiver. Further, Kansas would force the defendant to choose between two fundamental constitutional rights—the due process right to mount a defense, *Crane* v. *Kentucky*, 476 U.S. 683, 687 (1986), and the Fifth Amendment right not to incriminate himself, *Gibson* v. *Zahradnick*, 581 F.2d 75 (4th Cir. 1978). This Court has found such a choice "intolerable," *Simmons* v. *United States*, 390 U.S. 377, 394 (1968), and should not permit it here.

Nor is the State's position supported by a genuine need to rebut a defendant's evidence of mental state. A defendant's ability to present evidence of intoxication to demonstrate that he lacked specific intent is well-established, *Hopt* v. *People*, 104 U.S. 631, 634 (1881). Allowing a defendant to claim the privilege against self incrimination in mounting that defense does not deprive the State of its ability to challenge that defense.

ARGUMENT

I. ASSERTING A VALID MENTAL-STATE DEFENSE DOES NOT WAIVE FIFTH AMENDMENT PROTECTIONS.

Kansas urges this Court to adopt a new *per se* rule that criminal defendants "necessarily waive[]" their Fifth Amendment privilege against self-incrimination simply by presenting *any* mental-state evidence. Pet. Br. 11, 13, 24, 35. This Court has rejected previous attempts by states to craft *per se* rules that impermissibly infringe upon a defendant's constitutional rights, and it should do so here. See,

e.g., *Missouri* v. *McNeely*, 133 S. Ct. 1552, 1556 (2013); *Richards* v. *Wisconsin*, 520 U.S. 385, 391–96 (1997); *Rock* v. *Arkansas*, 483 U.S. 44, 62 (1987); *Brown* v. *Illinois*, 422 U.S. 590, 603 (1975).

A. The State's *Per Se* Waiver Rule is Contrary to the Zealous Protection of a Defendant's Fifth Amendment Privilege.

When the State must prove *mens rea* as an element of the crime, the defendant must be permitted to present evidence showing the absence of that element because "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane*, 476 U.S. at 690 (quoting *California* v. *Trombetta*, 467 U.S. 479, 485 (1984)); see also *Taylor* v. *Illinois*, 484 U.S. 400, 409 (1988); *Chambers* v. *Mississippi*, 410 U.S. 284, 294 (1973). By asserting a valid defense, the criminal defendant subjects the State's case to "'meaningful adversarial testing.'" *Crane*, 476 U.S. at 691 (quoting *United States* v. *Cronic*, 466 U.S. 648, 656 (1984)).

Our adversarial system "is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth." *Rogers*, 365 U.S. at 541. The "essence" of the Fifth Amendment privilege against self incrimination requires the Government to convict an individual through the "'independent labor of its officers'," rather than the "'simple, cruel expedient of forcing'" incriminating information from the defendant's own lips. *Mitchell* v. *United States*, 526 U.S. 314, 326 (1999) (quoting *Estelle* v. *Smith*, 451 U.S. 454, 462 (1981) (quoting *Culombe* v. *Connecticut*, 367 U.S. 568, 581–82 (1961))); see also John H. Langbein, *The Historical Origins of the Privilege Against Self*

Incrimination at Common Law, 92 Mich. L. Rev. 1047, 1048 (1994). Accordingly, "[t]his Court has always broadly construed" the Fifth Amendment privilege against self incrimination "to assure that an individual is not compelled to produce evidence which later may be used against him." *Maness* v. *Meyers*, 419 U.S. 449, 461 (1975). Absent voluntary waiver, it is "impermissible" for the prosecution to rely on compelled statements. *New Jersey* v. *Portash*, 440 U.S. 450, 459 (1979).

The most stringent scrutiny is reserved for purported waivers of fundamental constitutional rights. An effective waiver requires the "intentional relinquishment or abandonment of a known right or privilege." *Johnson*, 304 U.S. at 464. Valid waivers "not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady*, 397 U.S. at 748; see also *Culombe*, 367 U.S. at 602 ("free and unconstrained choice"). Consequently, "courts must 'indulge every reasonable presumption against waiver of fundamental constitutional rights.'" *Emspak*, 349 U.S. at 198 (quoting *Johnson*, 304 U.S. at 464).

This case is no different. The State's proposed *per se* rule cannot be reconciled with this Court's zealous protection of the privilege against compulsory self incrimination. That rule would hold that, by simply asserting a valid defense, a defendant would "necessarily waive[]" the privilege. Pet. Br. 11. "[I]t is doubtful whether such a 'waiver' could meet the high standard required for a voluntary, free and unconstrained . . . relinquishment of the Fifth Amendment privilege," because "[w]hat occurs is surely no waiver in the ordinary sense of a known and voluntary relinquishment." *United States* v. *Byers*, 740

F.2d 1104, 1113 (D.C. Cir. 1984) (en banc) (plurality opinion) (internal quotation marks and citation omitted).

The radical nature of the State's approach is most vividly illustrated by the simple fact that the State would reverse the traditional presumption against waiver and, instead, declare that a waiver has taken place in all cases where a defendant presents mental-state evidence. Under the State's approach, the presumption against waiver becomes meaningless because, contrary to well-established law, waiver would be "necessarily" assumed. See *Smith* v. *United States*, 337 U.S. 137, 150 (1949) ("Waiver of constitutional rights, however, is not lightly to be inferred."); *Johnson*, 304 U.S. at 464 ("whether there has been an intelligent waiver . . . must depend, in each case, upon the particular facts and circumstances surrounding that case. . . ."). The State hardly needs such a tool. The presumption against waiver is only that—a presumption. It can be overcome where, for example, the State can fairly argue that the disputed evidence squarely contradicts the defendant's proffered evidence and properly falls within the scope of rebuttal. See Resp't Br. 16–24.

B. The State's *Per Se* Waiver Rule Creates an Intolerable Choice Between Constitutional Rights.

The State's *per se* rule forces a defendant to choose between asserting a valid mental-state defense or asserting the Fifth Amendment privilege against self incrimination. See Pet. Br. 29 ("Cheever could have insulated himself from any such examination by withdrawing his mental-status defense."). Forcing a defendant to make such a choice is, as this Court said in *Simmons*, "intolerable." 390 U.S. at 394; *accord*.

Lefkowitz v. *Cunningham*, 431 U.S. 801, 808–09 (1977).

Courts and commentators have consistently interpreted *Simmons* as creating a "rule that prohibits the state from requiring defendants to choose between any two constitutional entitlements." Peter Westen, *Incredible Dilemmas: Conditioning One Constitutional Right on the Forfeiture of Another*, 66 Iowa L. Rev. 741, 744–45 n.14 (1981). Many courts have rejected states' attempts to force the "intolerable choice" between the privilege against self incrimination and other constitutional protections. See, *e.g.*, *Wehling* v. *Columbia Broad. Sys.*, 608 F.2d 1084, 1087 (5th Cir. 1979); *In re Grand Jury Empanelled Feb. 14, 1978*, 603 F.2d 469, 474 (3d Cir. 1979); *Collins* v. *Auger*, 577 F.2d 1107, 1110 (8th Cir. 1978); *United States* v. *Anderson*, 567 F.2d 839, 840 (8th Cir. 1977); *United States* v. *Sherpix, Inc.*, 512 F.2d 1361, 1370–71 (D.C. Cir. 1975); cf. *Gibson*, 581 F.2d at 80 ("Exercise of [the defendant's] right to a competency determination to prove that he was insane at the time of the act cannot be conditioned upon a waiver of his constitutional privilege against self-incrimination.").

"A defendant should not be compelled to choose between exercising his Fifth Amendment right not to incriminate himself and his due process right to seek out available defenses." *Collins*, 577 F.2d at 1110. The underlying decision in *Collins* v. *Auger*, 428 F. Supp. 1079 (S.D. Iowa 1977), illustrates the wisdom and need for this rule, particularly when (as in this case) the defendant wishes to present a psychiatrist's testimony to support his defense. In considering such a choice, the district court in *Collins* found that it is "immaterial" whether the psychiatric examination is to determine the defendant's "capacity to aid in his

own defense or his mental condition at the time of the crime." 428 F. Supp. at 1082.

Psychiatric examinations are "intimate, personal and highly subjective." *Id.* at 1084. In other words, the nature of the psychiatric examination is "likely to be more probing than either a courtroom cross-examination or a police interrogation because, as one psychiatrist explains, the goal of the examining psychiatrist is to get 'a sounding of the depths of the patient's personality.'" Welsh S. White, *The Psychiatric Examination and the Fifth Amendment Privilege in Capital Cases*, 74 Crim. L. & Criminology 943, 962 (1983) (quoting Meyers, *The Psychiatric Examination*, 54 J. Crim. L. Criminology & Police Sci. 431, 442 (1963)). This difference "relates to the magnitude of infringement upon the defendant's fifth amendment privilege." *Id.* at 963; see also Note, *Requiring a Criminal Defendant to Submit to a Government Psychiatric Examination: An Invasion of the Privilege Against Self-Incrimination*, 83 Harv. L. Rev. 648, 658 (1970) ("examinations impinge greatly on the inviolability of the personality"). Taking into consideration "the nature of the statement . . . and the exposure which it invites," *In re Gault*, 387 U.S. 1, 49 (1967), the State's *per se* rule results in the unjustifiable infringement upon a criminal defendant's Fifth Amendment privilege against self incrimination.

C. The State's *Per Se* Waiver Rule is Unnecessary.

There is, moreover, simply no need for a *per se* waiver rule. Kansas overstates the urgent need for waiver by arguing that "it is inherently unfair to allow the defendant to raise a mental-status defense without granting the State *any* meaningful opportunity to contest the defense through lawfully obtained rebuttal evidence." Pet. Br. 27. This argu-

ment ignores the fact that prosecutors regularly rebut mental-state defenses without relying on compelled testimony. See Resp't Br. 40–41 (citing cases). And it ignores the fact that the State can call a rebuttal expert or rebut fact witnesses without relying on the defendant's compelled testimony.

For example, the Court has long recognized that medically trained experts (like psychiatrists) "are competent to give their opinions in evidence" without "their own personal knowledge" and "in cases where they have not themselves seen the patient, and have only heard the symptoms and particulars of his state detailed by other witnesses at the trial." *Congress & Empire Spring Co.* v. *Edgar*, 99 U.S. 645, 657 (1878). Thus, allowing a defendant to present evidence of a valid defense without automatically forfeiting his fundamental right against compulsory incrimination will not "distort the truth-seeking process," "undermine the integrity of the criminal trial," or "impede the truth-seeking function" of the proceedings. Amicus Br. U.S. 7, 9. This Court should therefore reject *per se* waiver simply because the defendant introduces mental-state evidence.

II. PRESENTING EVIDENCE OF VOLUNTARY INTOXICATION DOES NOT WAIVE FIFTH AMENDMENT PROTECTIONS.

Mr. Cheever presented evidence of his voluntary intoxication to argue that he could not form the specific intent necessary for capital murder. This Court should not infer waiver of his privilege against compulsory self-incrimination simply because he asserted a valid defense under Kansas law and engaged in "meaningful adversarial testing" of the prosecution's burden of proof. *Cronic*, 466 U.S. at 656.

The availability and application of voluntary intoxication as a defense is a policy choice for the states, see *Powell* v. *Texas*, 392 U.S. 514, 535–36 (1968) (plurality opinion), and this Court has traditionally accorded the states "respect . . . in the establishment and implementation of their own criminal trial rules and procedures." *Chambers*, 410 U.S. at 302–03. Kansas enacted a valid statute that allows a criminal defendant to present relevant, probative evidence of voluntary intoxication to negate the mental-state element of a crime. When a defendant like Mr. Cheever presents a valid mental-state defense under state law, this Court should strike "a fair state-individual balance" and require prosecutors to "shoulder the entire load" of proving the elements of a crime without relying on compelled testimony. *Pennsylvania* v. *Muniz*, 496 U.S. 582, 595 n.8 (1990) (quoting *Doe* v. *United States*, 487 U.S. 201, 212–13 (1988) (quoting *Murphy* v. *Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 55 (1964) (internal citations omitted))).

A. History of the Voluntary Intoxication Defense.

The defense of voluntary intoxication is not a new concept. Criminal defendants have successfully asserted such defenses over the past several centuries. See Mitchell Keiter, *Just Say No Excuse: The Rise and Fall of the Intoxication Defense*, 87 J. Crim. L. & Criminology 482, 484–92 (1997); Meghan P. Ingle, Note, *Law on the Rocks: The Intoxication Defenses Are Being Eighty-Sixed*, 55 Vand. L. Rev. 607, 612–20 (2002). There is a long tradition of criminal defendants asking courts for lenience after committing criminal acts while inebriated, and American and British legal history reveals a surprising lack of hostility, if not outright acceptance, of the defense.

1. Early English legal attitudes toward drunkenness as a defense to culpability were unwelcoming, but never coalesced into adding *additional* punishment for drunkenness. One of the earliest cases declared: "As if a person that is drunk kills another, this shall be felony, and he shall be hanged for it, and yet he did it through ignorance, for when he was drunk he had no understanding nor memory; but inasmuch as that ignorance was occasioned by his own act and folly, and he might have avoided it, he shall not be priviledged [sic] thereby." *Reniger* v. *Fogossa*, (1550) 75 Eng. Rep. 1 (K.B.) 31. Francis Bacon agreed, writing in 1630 that "if a drunken man commit a felonie, he shall not be excused because his imperfection came by his own fault." *The Elements of the Common Lawes of England* 34 (1630). Even during this time, however, both Blackstone and Coke attempted to push inebriation beyond mere non-defense into an aggravating factor in assessing guilt, but were not successful. See Jerome Hall, *Intoxication and Criminal Responsibility*, 57 Harv. L. Rev. 1045, 1046 (1944).

The English courts' rejection of the intoxication defense began to change as attitudes about intoxication changed in the 17th and 18th centuries, prompting a "radical modification" of the law. *Id.* at 1048. As access to alcohol became widespread in society, alcoholism as a concept began to take shape, and the public came to believe that the problem "threatened to engulf the personality." Arlie Loughman, *Manifest Madness: Mental Incapacity in the Criminal Law* 175 (2012). For example, Sir Matthew Hale argued that habitual drunkenness, while "contracted by the vice and will of the party," should nonetheless be treated as involuntary and

thus excusable "phrenzy" in the commission of crime. 1 *History of the Pleas of the Crown* 32 (Thomas Dogherty ed., 1800) (1736). Views evolved to the point that even Sir James Fitzjames Stephen, previously an opponent of any lessening of culpability for inebriation, declared that judges could consider a defendant's drunkenness in deciding whether to reduce murder to manslaughter. See *Regina* v. *Doherty*, (1887) 16 Cox Cr. C. 306 (Cent. Crim. Ct.), 308; Hall, *supra*, at 1047, 1049.

2. The legal view of intoxication went through a similar metamorphosis in early America as well. The earliest reported case on the subject held that drunkenness was never a valid defense. See *Respublica* v. *Weidle*, 2 Dall. 88, 91 (Pa. 1781) ("[D]runkenness is no justification, or excuse, for committing the offence; to allow it as such, would open a door for the practice of the greatest enormities with impunity."). But the conventional wisdom started to shift by the 1800's, when habitual drunkenness was viewed as an addiction. See generally Harry G. Levine, *The Discovery of Addiction*, 39 J. Stud. Alcohol 143 (1978) (citing the assistance of the temperance movement in urging this view). While drunkenness was held to aggravate an offense (typically homicide) in mid-nineteenth-century cases in Texas, Illinois, and New York, each time the enhancement was overturned on appeal. R. U. Singh, *History of the Defence of Drunkenness in English Criminal Law*, 49 L. Q. Rev. 528, 531–32 & nn.23–24 (1933) (citing *People* v. *Rogers*, 18 N.Y. 9 (1858); *McIntyre* v. *People*, 38 Ill. 514 (1865); *Ferrell* v. *State*, 43 Tex. 503 (1875)).

By the 1850's, an American rule had formed: intoxication preventing a person from possessing intent to kill could reduce a charge of murder in the

first degree to murder in the second degree, see *Criminal Law—Murder—Intoxication as an Excuse*, 29 Yale L. J. 928, 928 (1920), though some jurisdictions went further, see, *e.g.*, *State* v. *Rumble*, 105 P. 1, 3 (Kan. 1909), *(superseded by statute, as stated in State* v. *Baacke*, 932 P.2d 396 (Kan. 1997)) ("[D]runkenness so extreme as to prevent the forming of a purpose to kill might, under our statute, reduce what would have been murder at the common law to manslaughter."). When this Court addressed the question in 1881, it surveyed the state of American common law at the time, determining that, while voluntary intoxication could not be a total excuse for homicide, a jury may consider it in assessing a defendant's purpose or intent in committing one. *Hopt*, 104 U.S. at 634; see also *Montana* v. *Egelhoff*, 518 U.S. 37, 47 (1996) (stating that this "new view" had prevailed by the late 1800's).

In the intervening years, any notion that inebriation could increase culpability had vanished. Two views remained: that intoxication should either not affect culpability or else *decrease* it, with the latter view having "gained a firm toehold in the law" by 1850. David McCord, *The English and American History of Voluntary Intoxication to Negate* Mens Rea, 11 J. Legal Hist. 372, 373–79 (1990). Despite this Court's apparent limitation of the issue to homicide in *Hopt*, state courts expanded the issue beyond drunkenness as a defense to premeditation into non-homicide crimes. Herbert Fingarette & Ann Fingarette Hasse, *Mental Disabilities and Criminal Responsibility* 90–91 (1979); see also, *e.g.*, *Cline* v. *State*, 43 Ohio St. 332, 334 (1885) ("[when] intent . . . is of the essence of the offense, it is possible that in proving intoxication you go far to prove that no crime was committed.").

The advent of specific intent as a basis for conviction of certain crimes other than homicide permitted voluntary intoxication to persist as a defense outside the realm of murder and manslaughter. See Fingarette & Hasse, *supra*, at 91–96; McCord, *supra*, at 382. Finally, the Model Penal Code, introduced in 1962, formally endorsed the defense and ensured that multiple states would adopt it. The Code adopted what was by then "the settled view of the common law": while intoxication is never an excuse for criminal conduct, "intoxication may generally be adduced in disproof if it is logically relevant" to an element of a crime requiring purpose or knowledge, such as premeditation or deliberation. Model Penal Code & Commentaries § 2.08 (1985).

B. Kansas Follows a Majority of States in Allowing the Voluntary Intoxication Defense.

Although states take different approaches to the defense of voluntary intoxication, a substantial majority of the states permit a defendant to introduce evidence of voluntary intoxication to negate an element of the crime.[2] See Addendum (listing thirty-five states). In Kansas, "[a]n act committed while in a state of voluntary intoxication is not less criminal by reason thereof . . . ." Kan. Stat. Ann. § 21-5205(b). Only "when a particular intent or other state of mind is a necessary element to constitute a particular crime, the fact of intoxication may be taken into consideration in determining such intent or state of mind." *Id.*

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[2] Fifteen states do not admit intoxication evidence as a defense to any crime, including: Arizona, Arkansas, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Mississippi, Missouri, Montana, Nebraska, Ohio, South Carolina, and Texas. See Addendum.

Kansas charged Mr. Cheever with capital murder under Kan. Stat. Ann. § 21-3439(a)(5) (2005), which is defined as the "intentional and premeditated killing of a law enforcement officer." Of course, Kansas has the burden to prove the elements of the offense, including Mr. Cheever's premeditated intent. See *In re Winship*, 397 U.S. 358, 364 (1970). Nevertheless, Kansas claims that Mr. Cheever "*affirmatively and deliberately injected*" the issue of his mental state into the trial. Pet. Br. 26 (emphasis in original). But the defense of voluntary intoxication is not an affirmative defense under Kansas law. See *State* v. *Kleypas*, 40 P.3d 139, 191–92 (Kan. 2001) ("instruction on voluntary intoxication did not limit the jury's consideration of [the [defendatnt's] state of intoxication nor did it limit consideration of any other evidence offered as to mental illness, prior drug use, or brain damage in determining whether the State proved the elements of the crime"), *overruled on other grounds by Kansas* v. *Marsh*, 548 U.S. 163 (2006). The plain language of the statute makes it clear that a defendant's intoxication is something that "may be taken into consideration" by the jury when it determines whether the State has proved each element beyond a reasonable doubt. Kan. Stat. Ann. § 21-5205(b). Moreover, the State's argument ignores the traditional nature of an affirmative defense. See Resp't Br. 42–48.

Even if the State's rule had some valid application in the context of an affirmative defense, it does not in this case because Mr. Cheever presented evidence to challenge scienter. Kansas cannot use testimony based on Mr. Cheever's compelled psychiatric examination to prove the elements of his crime. See, *e.g.*, *Rogers*, 365 U.S. at 541. The State must instead rely on the "independent labor of its officers."

Culombe, 367 U.S. at 582. In this case, Mr. Cheever raised a valid defense under Kansas law, which called the prosecution's evidence of his premeditation into question, yet the trial court allowed the prosecution to use evidence from his compelled psychiatric examination to prove his guilt. Pet. Br. 8–9 ("In Dr. Welner's professional opinion, Cheever retained the ability to think before acting on the morning he murdered Sheriff Samuels and was able to form the premeditated intent to kill."). In doing so, the trial court violated Mr. Cheever's Fifth Amendment privilege against compulsory self incrimination.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Supreme Court of the State of Kansas.

Respectfully submitted,

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ADDENDUM

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I. States that admit use of voluntary intoxication as a defense in some form

Alabama: Ala. Code § 13A-3-2(a) (2013) ("[I]ntoxication, whether voluntary or involuntary, is admissible in evidence whenever it is relevant to negate an element of the offense charged.").

Alaska: Alaska Stat. Ann. § 11.81.630 (West 2013) ("[E]vidence that the defendant was intoxicated may be offered whenever it is relevant to negate an element of the offense that requires that the defendant intentionally cause a result.").

California: Cal. Penal Code § 29.4(b) (West 2013) ("Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought.").

Colorado: Colo. Rev. Stat. Ann. § 18-1-804(1) (West 2013) ("[E]vidence of intoxication of the defendant may be offered by the defendant when it is relevant to negative the existence of a specific intent if such intent is an element of the crime charged.").

Connecticut: Conn. Gen. Stat. Ann. § 53a-7 (West 2013) ("[I]n any prosecution for an

offense evidence of intoxication of the defendant may be offered by the defendant whenever it is relevant to negate an element of the crime charged, provided when recklessness or criminal negligence is an element of the crime charged, if the actor, due to self-induced intoxication, is unaware of or disregards or fails to perceive a risk which he would have been aware of had he not been intoxicated, such unawareness, disregard or failure to perceive shall be immaterial.").

Illinois: *People* v. *Mocaby*, 194 Ill. App. 3d 441, 447 (1990) ("Intoxication may be a defense to a crime which requires a specific intent, such as murder, where the intoxication is so extreme as to suspend all reason and make it impossible for the defendant to form the necessary intent.").

Iowa: Iowa Code Ann. § 701.5 (West 2013) ("The fact that a person is under the influence of intoxicants or drugs . . . may be shown where it is relevant in proving the person's specific intent or recklessness at the time of the person's alleged criminal act or in proving any element of the public offense with which the person is charged.").

Kansas: Kan. Stat. Ann. § 21-5205(b) (West 2012) ("[W]hen a particular intent or other state of mind is a necessary element to constitute a particular crime, the fact of [voluntary] intoxication may be taken into consideration in

determining such intent or state of mind.").

Kentucky: Ky. Rev. Stat. Ann. § 501.080 (West 2012) ("Intoxication is a defense to a criminal charge only if such condition . . . . (1) Negatives the existence of an element of the offense . . . .").

Louisiana: La. Rev. Stat. Ann. § 14:15(2) (2012) ("Where the circumstances indicate that an intoxicated or drugged condition has precluded the presence of a specific criminal intent or of special knowledge required in a particular crime, this fact constitutes a defense to a prosecution for that crime.").

Maine: Me. Rev. Stat. Ann. tit. 17-A, § 37(1)–(2) (2013) ("1. Except as provided in subsection 2, evidence of intoxication may raise a reasonable doubt as to the existence of a required culpable state of mind. 2. When recklessness establishes an element of the offense, if a person, due to self-induced intoxication, is unaware of a risk of which the person would have been aware had the person not been intoxicated, such unawareness is immaterial.").

Maryland: *Hook* v. *State*, 553 A.2d 233, 235 (Md. 1989) ("Although voluntary intoxication is not a defense to murder, evidence with respect to it is relevant and material to a determination by the trier of fact of the degree of a murder alleged to be premeditated.").

Massachusetts: *Com.* v. *Henson*, 476 N.E.2d 947, 954 (Mass. 1985) ("It is time to announce that where proof of a crime requires proof of a specific criminal intent and there is evidence tending to show that the defendant was under the influence of alcohol or some other drug at the time of the crime, the judge should instruct the jury, if requested, that they may consider evidence of the defendant's intoxication at the time of the crime in deciding whether the Commonwealth has proved that specific intent beyond a reasonable doubt."); *Com.* v. *Troy*, 540 N.E.2d 162, 166 (Mass. 1989) (limiting evidence of intoxication to specific intent crimes).

Michigan: *People* v. *Watts*, 348 N.W.2d 39, 40–41 (Mich. Ct. App. 1984) ("Voluntary intoxication is a defense to a specific intent crime because such a crime cannot be committed where the intent did not exist; however, voluntary intoxication is not a defense to a general intent crime.").

Minnesota: Minn. Stat. Ann. § 609.075 (West 2013) ("[W]hen a particular intent or other state of mind is a necessary element to constitute a particular crime, the fact of [voluntary] intoxication may be taken into consideration in determining such intent or state of mind.").

Nevada: Nev. Rev. Stat. Ann. § 193.220 (West 2012) ("[W]henever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree

of crime, the fact of the person's [voluntary] intoxication may be taken into consideration in determining the purpose, motive or intent.").

N. Hampshire: N.H. Rev. Stat. Ann. § 626:4 (2013) ("The defendant may . . . introduce evidence of intoxication whenever it is relevant to negate an element of the offense charged, and it shall be taken into consideration in determining whether such element has been proved beyond a reasonable doubt.").

N. Jersey: N.J. Stat. Ann. § 2C:2-8(a), (b) (West 2013) ("[I]ntoxication of the actor is not a defense unless it negatives an element of the offense. b. When recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial.").

N. Mexico: *State* v. *Campos*, P.2d 1266, 1278 (N.M. 1996) ("Intoxication would only serve as a defense to the specific-intent aspect of the crime, namely the intentional nature of the killing, but would still leave the defendant guilty of a knowing killing, which is also second-degree murder.").

N. York: N.Y. Penal Law § 15.25 (McKinney 2013) ("[I]n any prosecution for an offense, evidence of intoxication of the defendant may be offered by the defendant whenever it is relevant to

negative an element of the crime charged.").

N. Carolina: *State* v. *Golden*. 546 S.E.2d 163, 166 (N.C. 2001) ("[Voluntary intoxication] is only a viable defense if the degree of intoxication is such that a defendant could not form the specific intent required for the underlying offense.").

N. Dakota: N.D. Cent. Code Ann. § 12.1-04-02 (West 2011) ("Evidence of intoxication is admissible whenever it is relevant to negate or to establish an element of the offense charged. 2. A person is reckless with respect to an element of an offense even though his disregard thereof is not conscious, if his not being conscious thereof is due to self-induced intoxication.")

Oklahoma: *Crawford* v. *State*, 840 P.2d 627, 638 (Okla. Crim. App. 1992) ("However, we recognize an exception to this rule where the accused was so intoxicated that his mental abilities were totally overcome and it therefore became impossible for him to form criminal intent.") (*abrogated by Malone* v. *State*, 168 P.3d 185 (Okla. Crim. App. 2007).

Oregon: Or. Rev. Stat. Ann. § 161.125 (West 2013) ("[I]n any prosecution for an offense, evidence that the defendant . . . was intoxicated may be offered by the defendant whenever it is relevant to negative an element of the crime charged. (2) When recklessness establishes an element of the offense, if

the defendant, due to . . . voluntary intoxication, is unaware of a risk of which the defendant would have been aware had the defendant been not intoxicated . . . such unawareness is immaterial.").

Pennsylvania: 18 Pa. Cons. Stat. Ann. § 308 (West 2013) ("[E]vidence of [voluntary intoxication] of the defendant may be offered by the defendant whenever it is relevant to reduce murder from a higher degree to a lower degree of murder.").

Rhode Island: *State* v. *Sanden*, 626 A.2d 194, 199 (R.I. 1993) ("It is well settled in this state that if specific intent is an essential element of a crime, namely, murder, then the defendant's intoxication may be offered to negate his or her specific intent if it is 'of such a degree as to completely paralyze the will of the [defendant], take from him [or her] the power to withstand evil impulses and render his [or her] mind incapable of forming any sane design.'") (quoting *State* v. *Vanasse*, 107 A. 85, 86 (1919)).

S. Dakota: S.D. Codified Laws § 22-5-5 (2013) ([I]f the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was [voluntarily] intoxicated at the time in determining the purpose, motive, or intent with which the accused committed the act.").

Tennessee: Tenn. Code Ann. § 39-11-503(a)–(b) (West 2013) ("[I]ntoxication, whether voluntary or involuntary, is admissible in evidence, if it is relevant to negate a culpable mental state. (b) If recklessness establishes an element of an offense and the person is unaware of a risk because of voluntary intoxication, the person's unawareness is immaterial in a prosecution for that offense.").

Utah: Utah Code Ann. § 76-2-306 (West 2013) ("Voluntary intoxication shall not be a defense to a criminal charge unless such intoxication negates the existence of the mental state which is an element of the offense; however, if recklessness or criminal negligence establishes an element of an offense and the actor is unaware of the risk because of voluntary intoxication, his unawareness is immaterial in a prosecution for that offense.").

Vermont: *State* v. *Myers*, 26 A.3d 9, 23 (Vt. 2011) ("We have long recognized that voluntary intoxication can provide a defense to certain crimes . . . 'When specific intent is an element of a crime, evidence of either voluntary or involuntary intoxication may be introduced to show that the defendant could not have formed the necessary intent.'") (quoting *State* v. *Joyce*, 433 A.2d 271, 272 (1981)).

Virginia: *Chittum* v. *Com.*, 174 S.E.2d 779, 783 (Va. 1970) ("'Voluntary drunkenness, where it has not produced permanent insanity, is Never an excuse for crime;

Except, where a party is charged with murder, if it appear that the accused was too drunk to be capable of deliberating and premeditating, then he can be convicted only of murder in the second degree'.") (quoting *Gills* v. *Com.*, 126 S.E. 51, 53 (1925)).

Washington: Wash. Rev. Code Ann. § 9A.16.090 (West 2013) ("[W]henever the actual existence of any particular mental state is a necessary element to constitute a particular species or degree of crime, the fact of . . . intoxication may be taken into consideration in determining such mental state.").

W. Virginia: *State* v. *Keeton*, 272 S.E.2d 817, 818, 820 (W. Va. 1980) ("[Voluntary] intoxication may reduce murder in the first degree to murder in the second degree, as long as the specific intent did not antedate the intoxication."; "[V]oluntary drunkenness . . . may reduce the degree of the crime or negative a specific intent.") (citation omitted).

Wisconsin: Wis. Stat. Ann. § 939.42 (West 2013) ("An intoxicated or a drugged condition of the actor is a defense only if such condition . . . (2) Negatives the existence of a state of mind essential to the crime, except as provided in s. 939.24(3)."); Wis. Stat. Ann. § 939.24(3) (West 2013) ("A voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness if, had the actor not been in that condition, he or she would have been aware of

creating an unreasonable and substantial risk of death or great bodily harm to another human being.").

Wyoming: Wyo. Stat. Ann. § 6-1-202(a) (West 2013) ("Self-induced intoxication of the defendant is not a defense to a criminal charge except to the extent that in any prosecution evidence of self-induced intoxication of the defendant may be offered when it is relevant to negate the existence of a specific intent which is an element of the crime.").

II. States that do not admit intoxication evidence as a defense to any crime

Arizona: Ariz. Rev. Stat. Ann. § 13-503 (2013) ("Temporary intoxication. . . does not constitute insanity and is not a defense for any criminal act or requisite state of mind.").

Arkansas: *White* v. *State*, 717 S.W.2d 784, 784 (Ark. 1986) ("[V]oluntary intoxication is no defense to criminal prosecutions . . . .").

Delaware: Del. Code Ann. tit. 11, § 421 (West 2013) ("The fact that a criminal act was committed while the person committing such act was in a state of [voluntary] intoxication, or was committed because of such intoxication, is no defense to any criminal . . . .").

Florida: Fla. Stat. Ann. § 775.051 (West 2013) ("Evidence of a defendant's voluntary intoxication is not admissible to show

that the defendant lacked the specific intent to commit an offense and is not admissible to show that the defendant was insane at the time of the offense . . . .").

Georgia: Ga. Code Ann. § 16-3-4(c) (West 2013) ("Voluntary intoxication shall not be an excuse for any criminal act or omission.").

Hawaii: Haw. Rev. Stat. § 702-230(1) (West 2013) ("(1) Self-induced intoxication is prohibited as a defense to any offense . . . .").

Idaho: Idaho Code Ann. § 18-116 (West 2013) ("A person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense . . . .").

Indiana: Ind. Code Ann. § 35-41-2-5 (West 2013) ("Intoxication is not a defense in a prosecution for an offense and may not be taken into consideration in determining the existence of a mental state that is an element of the offense . . . .").

Mississippi: *Adams* v. *State*, 62 So. 3d 432, 441 (Miss. Ct. App. 2011) ("It is well established that voluntary intoxication is not a defense in Mississippi . . . '[t]he *McDaniel* rule prevents "submission to a jury the question of voluntary

intoxication as a defense in specific intent offenses.'" *Lee* v. *State*, 403 So. 2d 132, 134 (Miss.1981)") (citing *McDaniel* v. *State*, 356 So. 2d 1151, 1160 (Miss. 1978)).

Missouri: Mo. Ann. Stat. § 562.076(1), (3) (West 2013) ("1. A person who is in an intoxicated . . . condition . . . from alcohol . . . is criminally responsible for conduct . . . 3. Evidence that a person was in a voluntarily intoxicated . . . condition may be admissible when otherwise relevant on issues of conduct but in no event shall it be admissible for the purpose of negating a mental state which is an element of the offense.").

Montana: Mont. Code Ann. § 45-2-203 (West 2013) ("[A]n intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state that is an element of the offense . . . .").

Nebraska: Neb. Rev. Stat. Ann. § 29-122 (West 2012) ("Intoxication is not a defense to any criminal offense and shall not be taken into consideration in determining the existence of a mental state that is an element of the criminal offense . . . .").

Ohio: Ohio Rev. Code Ann. § 2901.21(c) (West 2013) ("Voluntary intoxication may not be taken into consideration in determining the existence of a mental state that is an element of a criminal offense. Voluntary intoxication does not relieve a person of a duty to act if failure

to act constitutes a criminal offense. [E]vidence that a person was voluntarily intoxicated may be admissible to show whether or not the person was physically capable of performing the act with which the person is charged.").

S. Carolina: *State* v. *Vaughn*, 232 S.E.2d. 328, 330 (S.C. 1977) ("We adopt the rule that voluntary intoxication, where it has not produced permanent insanity, is never an excuse for or a defense to crime, regardless of whether the intent involved be general or specific.").

Texas: Tex. Penal Code Ann. § 8.04(a) (West 2013) ("Voluntary intoxication does not constitute a defense to the commission of crime.").

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-609

In The
Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

SCOTT D. CHEEVER,

Respondent.

**On Writ Of Certiorari To
The Supreme Court Of Kansas**

BRIEF OF AMICI CURIAE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION, KANSAS COUNTY AND DISTRICT ATTORNEYS ASSOCIATION, MISSOURI PROSECUTING ATTORNEYS ASSOCIATION, DISTRICT ATTORNEYS ASSOCIATION OF THE STATE OF NEW YORK, AND OKLAHOMA DISTRICT ATTORNEYS ASSOCIATION, IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

When a criminal defendant has presented expert evidence as to the defendant's mental state at the time of the commission of a crime, based in part on the defense expert's interview of the defendant, does the Fifth Amendment privilege against self-incrimination permit the state to respond with rebuttal evidence from a different mental state expert who has conducted an examination and interview of the defendant that was compelled by court order?

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STATEMENT OF INTEREST

This brief is submitted by the National District Attorneys Association (NDAA), the California District Attorneys Association, the Kansas County and District Attorneys Association, the Missouri Prosecuting Attorneys Association, the District Attorneys Association of the State of New York, and the Oklahoma District Attorneys Association, as amici curiae in support of petitioner the state of Kansas.[1]

NDAA is the largest and primary professional association of prosecuting attorneys in the United States. The association has approximately 7,000 members, including most of the nation's local prosecutors, assistant prosecutors, investigators, victim witness advocates, and paralegals. The mission of the association is, "To be the voice of America's prosecutors and to support their efforts to protect the rights and safety of the people." NDAA provides professional guidance and support to its members, serves as a resource and education center, produces publications, and follows and addresses public policy issues involving criminal justice and law enforcement.

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[1] Pursuant to Supreme Court Rule 37.2(a), amici state that all parties have consented in writing to the filing of this brief in letters on file with the Clerk of the Court. Pursuant to Rule 37.6, amici state that no counsel for any party authored this brief in whole or in part, and that no entity or person, other than amici, their members, and their counsel, made any monetary contribution towards the preparation and submission of this brief.

The California District Attorneys Association, the Kansas County and District Attorneys Association, the Missouri Prosecuting Attorneys Association, the District Attorneys Association of the State of New York, and the Oklahoma District Attorneys Association, are the professional associations for prosecuting attorneys in their respective states. They share goals and missions similar to those of NDAA, including maintaining high professional standards and ethics, training and education of prosecutors, and advocating for the interest of prosecutors in cases of significant national interest and impact.

This case raises matters of concern to prosecutors nationwide. The issue before the Court concerns the manner in which the prosecution may rebut evidence relating to mental state that a criminal defendant has put forward at trial to reduce or negate culpability for a crime. The decision by this Court will define the parameters concerning waiver of the Fifth Amendment privilege against self-incrimination when a criminal defendant has put forward evidence as to his mental state through the testimony of an expert who has examined the defendant in the context of a mental state evaluation.

Amici have expertise in the matters pending before the Court in this case, and believe that this brief will be helpful to this Court in its consideration of these matters.

FACTUAL AND PROCEDURAL BACKGROUND

On January 19, 2005, Sheriff Matt Samuels, with two deputies, went to a house to arrest respondent Scott Cheever on a warrant. Cheever became aware of the approach of the officers, and hid in an upstairs room. As Sheriff Samuels came up the stairs, Cheever ambushed him with two gunshots to the chest. Cheever then shot at the other officers, and eventually at SWAT officers who responded, before finally surrendering. Sheriff Samuels died from his wounds.

Because of legal questions in 2005 about the constitutionality of the Kansas death penalty law, Cheever was prosecuted in federal court. In federal court, after the defense gave notice of intent to present expert mental state evidence, Cheever was ordered to submit to a psychiatric examination by Dr. Michael Welner.

Later, in June 2006, the Kansas death penalty law was declared constitutional by this Court. In September 2006, a mistrial occurred on the federal court prosecution. At that point, the state authorities returned the prosecution to state court. When the state prosecution went to trial, the defense presented evidence from an expert psychiatric pharmacist, Dr. R. Lee Evans, that respondent suffered from methamphetamine intoxication at the time of the murder, making him unable to premeditate and intend to kill. The prosecution then sought to present, and the trial court permitted, the testimony of Dr. Welner in rebuttal.

On appeal, the Kansas Supreme Court held that the presentation of Dr. Welner's testimony violated respondent's privilege against self-incrimination under the Fifth Amendment. The state sought review from this Supreme Court, which granted certiorari.

SUMMARY OF ARGUMENT

The unusual procedural posture of this case led to the appointment of a mental state expert psychiatrist in federal court to examine respondent under circumstances that would not have been permitted under Kansas law. The Kansas Supreme Court linked its analysis of the Fifth Amendment privilege against self-incrimination to state law rules, which are not relevant to the operation of the Fifth Amendment privilege against self-incrimination. Under principles accepted by this Court, a defendant who presents expert mental state evidence waives the privilege against self-incrimination, to the extent that he must submit to a psychiatric examination, including an interview, and the prosecution may present the results of that examination in rebuttal once the defense has presented its own expert mental state evidence. In this case, the examination and testimony of the prosecution's mental state evidence were directly comparable to the defense evidence, and thus well within the operation of these Fifth Amendment principles.

ARGUMENT

I. THE PROCEDURAL STEPS LEADING TO THE APPOINTMENT OF DR. WELNER AND THE RELATIONSHIP OF THOSE STEPS TO KANSAS STATE PROCEDURES ARE NOT RELEVANT FOR FIFTH AMENDMENT PURPOSES

What the Kansas Supreme Court perceived to be a Fifth Amendment violation arose from the unusual procedural background of this case. The issue relates to the appointment of Dr. Welner to conduct a compelled mental examination of respondent, and Dr. Welner's later testimony in rebuttal for the prosecution at respondent's trial. The facts surrounding the appointment of Dr. Welner and his examination of respondent do not reflect any infringement of respondent's constitutional rights.

After respondent committed the murder of Sheriff Samuels and the attempted murder of the peace officers in January 2005, the case was originally, briefly, filed in Kansas state court. However, because at that time the viability of the death penalty in Kansas was in question due to an unfavorable Kansas Supreme Court decision, Kansas authorities sought cooperation from federal prosecutors to pursue the case in federal court, which was done. While the case was in federal court, on December 22, 2005, respondent's counsel filed a notice of intent "to introduce expert evidence relating to a mental disease or defect or any other mental condition" as required under Federal Rule of Criminal Procedure 12.2. The

notice specifically stated that the expert evidence would "relat[e] to his intoxication by methamphetamine at the time of the events at the Cooper residence on January 19, 2005, which negated his ability to form specific intent, *e.g.*, malice aforethought, premeditation and deliberation." In response to that notice the federal court appointed Dr. Welner under Rule 12.2(c), and he conducted his examination of respondent. (Cert. Petn., p. App. 69-70.)

Six months later, this Court overruled the Kansas Supreme Court and held the Kansas death penalty was constitutional. (*Kansas v. Marsh*, 548 U.S. 163 (2006), decided June 26, 2006). Three months after that (September 2006), a mistrial was declared in respondent's federal trial. At that point, the federal case was dismissed, and the prosecution was again commenced in state court.

The Kansas statute for declaring intent to present mental state evidence (K.S.A. 22-3219) and appointing a psychiatrist for a compelled examination applies only when a defendant will present evidence of "mental disease or defect." This is narrower than Federal Rule 12.2, which as noted above applies when the defendant will present evidence of "mental disease or defect *or any other mental condition*." It was the position of respondent at trial, and implicit in the holding of the Kansas Supreme Court below, that had all the proceedings taken place in Kansas state court under the Kansas statutes, respondent would not have been required to give notice or undergo a compelled examination, because his defense was related

to methamphetamine intoxication, not mental disease or defect. (Joint Appendix [hereafter J.A.] 88-91; *State v. Cheever*, 295 Kan. 229, 247-251, 284 P.2d 1007 (2012)). The Kansas Supreme Court expressly held that by putting on only evidence of mental state related to voluntary intoxication, respondent had not waived his Fifth Amendment rights as to the Dr. Welner examination:

> Cheever's voluntary intoxication defense was based on evidence that his mental state at the time of the crime was a product of a combination of immediate voluntary ingestion of methamphetamine and long-term use of the drug. Cheever did not present evidence, however, that his use of methamphetamine had caused permanent mental impairment. . . . Accordingly, we find that Cheever's evidence showed only that he suffered from a temporary mental incapacity due to voluntary intoxication; it was not evidence of a mental disease or defect within the meaning of K.S.A. 22-3220. Consequently, Cheever did not waive his Fifth Amendment privilege and thus permit his court-ordered examination by Dr. Welner to be used against him at trial. Therefore, we conclude that allowing Welner to testify in rebuttal to the voluntary intoxication defense violated Cheever's constitutional rights under the Fifth and Fourteenth Amendment to the United States Constitution.

(*State v. Cheever*, supra, 295 Kan. at 251.)

With all due respect to the Kansas Supreme Court, this focus on Kansas procedural requirements led the analysis astray. Whether Dr. Welner's appointment complied with Kansas state procedure is irrelevant for Fifth Amendment purposes. Proper analysis of whether there has been a Fifth Amendment violation must begin with the Fifth Amendment, not with state law.

II. DEFENDANT WHO PLACES HIS MENTAL STATE IN ISSUE HAS WAIVED HIS FIFTH AMENDMENT RIGHTS AS TO A COMPELLED OR COURT ORDERED MENTAL STATE EXAMINATION

A. *Estelle v. Smith* and *Buchanan v. Kentucky*, and Their Progeny, Establish That a Defendant Who Proffers or Presents Mental State Evidence Has Waived His Self-Incrimination Privilege with Respect to Evidence from a Compelled or Court Ordered Mental State Examination

This Court has long recognized that when a criminal defendant places his mental status at issue, the prosecution may be permitted to rebut the mental status evidence with evidence from a court ordered mental examination of defendant without violating his Fifth Amendment privilege against self-incrimination. Both *Estelle v. Smith*, 451 U.S. 454 (1980) (*Estelle*) and *Buchanan v. Kentucky*, 483 U.S. 402 (1987) (*Buchanan*) discuss the issue in detail.

Estelle concerned the admission of a psychiatrist's testimony during the penalty phase of a capital murder trial. The psychiatrist had examined the defendant to determine his competency to stand trial. *Buchanan* involved the State's use of psychiatric information about defendant to rebut defendant's claim that his "extreme emotional disturbance" impacted his ability to form a criminal intent. The only reasonable way to resolve the instant case consistent with this Court's pronouncements in *Estelle* and *Buchanan* is to settle the issue in favor of petitioner, the State of Kansas.

In *Estelle*, the defendant underwent a court-ordered pre-trial competency examination without notice to defense counsel. Although it was ordered for purposes of determining the defendant's competency, the examination results were later used in the penalty phase of trial to prove defendant's future dangerousness. (451 U.S. at 463, 464-465.) Affirming the Fifth Circuit Court of Appeals' conclusion that " 'Texas may not use evidence based on a psychiatric examination of the defendant unless the defendant was warned, before the examination, that he had a right to remain silent; was allowed to terminate the examination when he wished; and was assisted by counsel in deciding whether to submit to the examination[,]' " (*Estelle*, 451 U.S. at 461, quoting *Smith v. Estelle*, 602 F.2d 694, at 709 (5th Cir. 1979)), this Court found that the State violated the defendant's Fifth Amendment privilege against self-incrimination when it used information from the examination to prove the

defendant's dangerousness and obtain a verdict of death. This Court based its decision on the failure to advise the defendant of his Fifth Amendment right to remain silent prior to his participation in the examination. (451 U.S. at 467-468.)[2] Additionally, there was discussion about the fact that the information was gathered for one purpose – to determine competency – and ultimately used for the vastly different purpose of determining punishment. (*Id.* at 468-469.)

Estelle's holding regarding the reach of the Fifth Amendment privilege was limited to cases in which the defendant neither initiated a psychiatric evaluation nor attempted to introduce any psychiatric evidence of his own. (451 U.S. at 454.) However, *Estelle* indicated that psychiatric evidence obtained from a compelled mental examination might not violate a defendant's Fifth Amendment privilege against self-incrimination in certain circumstances. Indeed, *Estelle* approved of the Fifth Circuit's "carefully le[aving] open 'the possibility that a defendant who wishes to use psychiatric evidence in his own behalf [on the issue of future dangerousness] can be precluded from using it unless he is [also] willing to be examined by a psychiatrist nominated by the state.'" (*Id.* at 466, fn. 10.) More broadly, the *Estelle*

---

[2] This Court also held on the facts of *Estelle* that the examination had violated defendant's Sixth Amendment constitutional right to counsel. As no Sixth Amendment issue is before the Court in the instant case, that aspect of *Estelle* will not be addressed further.

court understood that "[w]hen a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence [in a court ordered mental state examination] may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case." (*Id.* at 465.)

Estelle did not explicitly reach the issue of whether the State has the right to rebut defense mental state evidence with evidence obtained from a compelled mental examination. But the reasoning of *Estelle*, forbidding the prosecution from using in the penalty phase evidence from the competency examination, rested in significant measure on distinguishing cases where the defendant did not introduce psychiatric or mental state evidence (as was the case in *Estelle*), from cases where the defendant did introduce such evidence. (451 U.S. at 465-466.) In so doing, *Estelle* indicated the receptiveness of this Court to the rule previously adopted by many courts that a defendant who does introduce his own mental state evidence may be required to submit to an examination by the prosecution's psychiatrist. (*Id.*) Justice Rehnquist's concurring opinion went so far as to state that he would decline to extend the privilege against self-incrimination to psychiatric examinations. (*Id.* at 475-476, Rehnquist, J., concurring.)[3]

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[3] Justice Rehnquist did find a Sixth Amendment violation, as the defense attorney in *Estelle* had not been informed prior to the examination taking place, an issue not presented here.

Justice Brennan and Justice Marshall filed separate concurrences in *Estelle*. Each declined to join the majority on the constitutionality of the death penalty. Justice Brennan otherwise joined the opinion of the Court in full, including part II-C of the majority opinion, which included the cited discussion about compelled examination by a prosecution psychiatrist. (451 U.S. at 474, Brennan, J., concurring.) While Justice Marshall declined to join in part II-C of the opinion of the Court, he made it clear his disagreement was with the implicit holding in the Court's opinion that the death penalty could be constitutionally imposed. (*Id.*, Marshall, J., concurring.) As will be seen, Justice Marshall's view did not involve any disagreement with the rule that the defendant, by putting on mental state evidence, would open the door to a compelled examination by a prosecution psychiatrist.

Seven years after *Estelle*, when this Court decided *Buchanan v. Kentucky*, it identified a circumstance in which the prosecution could rebut a mental defense with evidence from a compelled psychiatric examination without violating the defendant's Fifth Amendment privilege against self-incrimination. *Buchanan* held that, where a defendant requests a psychological evaluation or presents psychiatric evidence to support a mental defense (in *Buchanan*, the defense was "extreme emotional disturbance"), the prosecution may rebut this defense with the report of the court ordered examination without

implicating the defendant's Fifth Amendment privilege against self-incrimination.

In *Buchanan*, the defense drew on information obtained prior to defendant's arrest in that case. The prosecution then introduced evidence from a court-ordered mental examination jointly requested by both the prosecution and the defense after the defendant's arrest. In holding that the use of this evidence did not violate defendant's Fifth Amendment privilege against self-incrimination, this Court upheld the lower court's determination that defendant had opened the door to this evidence when he placed his mental state in issue. (483 U.S. at 414, quoting *Buchanan v. Commonwealth*, 691 S.W.2d 210, 213 (1985).) The examination used by the State in rebuttal had been jointly requested. Also, Buchanan's "entire defense strategy was to establish the 'mental status' defense of extreme emotional disturbance," (*Id.* at 423) further distinguishing it from *Estelle* – and likening it to the instant case.

Taken together, *Estelle* and *Buchanan* make it clear this Court has long subscribed to the view that when the defense places the defendant's mental state at issue by introducing evidence from a forensic mental state expert who examined the defendant, it opens the door to the prosecution putting on psychiatric evidence in rebuttal, including psychiatric evidence from a compelled examination. Indeed, examining the opinions of the various justices in the two cases, one can find little dissension on this point. Not one justice dissented in *Estelle*, although Justice Marshall

declined to sign on to Part II-C of the opinion for reasons, as he noted, related to the death penalty, and not to the Fifth Amendment. (451 U.S. at 474, Marshall, J., dissenting.) Justice Marshall made his position crystal clear in his later dissenting opinion in *Buchanan*, (with Justice Brennan joining). Justice Marshall there explained that his disagreement with the *Buchanan* majority was its approval of the prosecution's rebuttal use of the specific exam that had been conducted in that case, an exam which was related to the issue of competence to stand trial, and thus in Justice Marshall's view had therapeutic goals that would be thwarted if it could be used in the guilt determination.[4] (483 U.S. at 426, Marshall, J., dissenting.) In so stating, however, Justice Marshall actually endorsed the proposition advanced in the case at bar by the State of Kansas and this amicus brief:

> The Commonwealth is free, of course, to compel a *separate* examination specifically inquiring as to the mental condition of the defendant at the time of the alleged offense, once put on notice that the defendant will place this mental condition in issue. [citing *Estelle* at 465.] Given notice, the Commonwealth bears full responsibility for being prepared at trial to rebut a mental status defense.

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[4] In the instant case, the psychiatric examination was not alleged to have been obtained for therapeutic reasons; it is clear that the examination was obtained pursuant to federal court order (J.A. 90.)

(*Buchanan*, supra, 483 U.S. at 433, fn. 5, Marshall, J., dissenting)

Thus, Justice Marshall's view of the issue presented in the case at bar did not diverge from that of the other justices. Since Brennan joined Marshall's dissent, eight of the nine justices deciding *Buchanan* indicated that the Fifth Amendment's protections would allow the prosecution to use psychiatric evidence from a court ordered examination in a rebuttal case where the defense had placed his mental status in issue. The ninth vote, Justice Stevens, joined only the first part of Justice Marshall's dissent in *Buchanan*; he did not file or sign any other opinion, and therefore did not register his view on the topic in *Buchanan*. However, Justice Stevens did join the majority opinion in *Estelle*, which included the discussion about compelled psychiatric examination described above.

In the wake of *Buchanan*, decisions from a broad range of Circuit Courts of Appeals, citing that case, have held that when a criminal defendant puts on or gives notice of an intent to present mental state evidence, he can be compelled to submit to an examination by a psychiatrist for the prosecution, and that the prosecution can put on such evidence in rebuttal, without violating the defendant's Fifth Amendment right against self-incrimination. *Muhammed v. Kelly*, 575 F.3d 359, 372-374 (4th Cir. 2009); *Savino v. Murray*, 82 F.3d 593, 604 (4th Cir. 1996); *United States v. Curtis*, 328 F.3d 141, 144-145 (4th Cir. 2003); *Silagy v. Peters*, 905 F.3d 986, 1005-1006 (7th Cir.

1990); *Pawlyk v. Wood*, 248 F.3d 815, 828 (9th Cir. 2001); *Strickland v. Linahan*, 72 F.3d 1531, 1533-1537 (11th Cir. 1996); *Isley v. Dugger*, 877 F.2d 47 (11th Cir. 1989).

Likewise, a wide variety of state courts have held, following *Buchanan*, that when a defendant tenders his mental state as an issue in a criminal case, he has waived his Fifth Amendment privilege against self-incrimination, "to the extent necessary to permit a proper examination of that condition." *People v. Carpenter*, 15 Cal.4th 312, 412, 935 P.2d 708 (1997). See also *Maldonado v. Superior Court*, 53 Cal.4th 1112, 1113, 274 P.3d 1110 (2012).

In addition to this pronouncement from the California Supreme Court, and not considering pronouncements from state intermediate appellate courts, at least a dozen other state supreme courts have enunciated such a rule: *State v. Ross*, 269 Conn. 213, 295-296, 849 A.2d 648 (Conn. 2003); *Re v. State*, 540 A.2d 423, 429-430 (Del. 1988); *Durham v. State*, 281 Ga. 208, 210, 636 S.E.2d 513 (Ga. 2006); *State v. Payne*, 146 Idaho 548, 570-571, 199 P.3d 123 (Idaho 2008); *People v. Pulliam*, 206 Ill.2d 218, 246-248, 794 N.E.2d 214 (Ill. 2002); *Hartless v. State*, 327 Md. 558, 563-572, 611 A.2d 581 (Md. 1992); *State v. Briand*, 130 N.H. 650, 652-658, 547 A.2d 235 (N.H. 1988); *Mitchell v. State*, 124 Nev. 807, 810-816, 192 P.3d 721 (Nev. 2008); *Lockett v. State*, 53 P.3d 418, 426 (Okla. 2002); *Commonwealth v. Rosen*, 42 A.3d 988 (Pa. 2012); *State v. Martin*, 950 S.W.2d 20, 23-25 (Tenn. 1997); *State v. Herrera*, 895 P.2d 359, 369-371 (Utah

1995); *State v. Baker*, 180 W.Va. 233, 237-240, 376 S.E.2d 127 (W.Va. 1988).

Among these cases, the New Hampshire Supreme Court set out a straightforward theoretical and practical explanation for this rule in *Briand*, supra:

> . . . [I]t is a defendant's voluntary act of taking the stand and giving testimony that is sufficient to constitute the waiver and subject the defendant to enquiries [through cross examination] he would not otherwise be compelled to answer.
>
> A defendant performs a functionally similar voluntary act when he calls a psychologist or psychiatrist to testify on his behalf, based on a personal interview with him. This is so because the expert witness depends upon the defendant's own statements of relevant facts as the foundation for the expert's opinion. Presumably, the witness would lack an adequate foundation to form and express such an opinion, and would therefore be barred from giving one, without the defendant's account of the relevant events of his own history and state of mind. Because the expert's testimony is thus predicated on the defendant's statements, the latter are explicitly or implicitly placed in evidence through the testimony of the expert during his direct and cross-examination. Since a defendant would waive his privilege against compelled self-incrimination if he took the stand and made those same statements himself, his decision to introduce his account of relevant

> facts indirectly through an expert witness should likewise be treated as a waiver obligating him to provide the same access to the State's expert that he has given to his own, and opening the door to the introduction of resulting State's evidence, as the State requests here, to the extent that he introduces comparable evidence on his own behalf. Just as the State may not use a compelled psychological examination to circumvent the privilege against self-incrimination, . . . neither may a defendant voluntarily employ a psychological witness wholly to negate the waiver that his direct introduction of personal testimony would otherwise effect.

(*State v. Briand*, supra, 130 N.H. at 655-656, 547 A.2d at 239.)

Thus, under the Fifth Amendment principles enunciated by this Court in *Estelle* and *Buchanan*, and by many other courts, when a defendant places his mental status at the time of the crime at issue in the case, the prosecution is entitled to rebut the defense evidence. The prosecution may, for that purpose, seek and use a compelled mental state examination of the defendant, conducted by a court appointed expert or the prosecution's expert.

B. The Scope of the Defendant's Waiver and the Prosecution Right to Respond When the Defendant Presents Mental State Evidence is Governed by the Breadth of the Federal Constitutional Rule

The scope of the waiver, and the response permissible under the Fifth Amendment on the part of the prosecution, can be understood by making reference to *Buchanan*. In that case, the defendant was charged with murder. Under Kentucky law, it was a defense if the defendant "acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse." (483 U.S. at 406, fn. 3.) The defense had the burden of production for this defense, and the defense could not be established just by a showing of mental illness. (*Id.* at 408, fn. 8.) Indeed, Kentucky courts have held that extreme emotional disturbance and mental illness are not one and the same, and mental illness, alcohol intoxication or drug intoxication may factor into the analysis. See *Wellman v. Commonwealth*, 694 S.W.2d 696 at 697 (Ky. 1985), the same case this Court cited to in *Buchanan* when discussing Kentucky law on this point. At trial in *Buchanan*, the defense brought forward evidence of the defendant's extreme emotional disturbance by calling as a witness Martha Elam, a social worker who had been assigned to the defendant's case. On direct examination by the defense, Elam read from certain reports, including a psychological evaluation of the defendant that had been undertaken following his arrest for burglary as a

juvenile. On cross-examination, the prosecutor sought to question Elam about a report by Dr. Lange, who had been appointed to examine the defendant after his arrest in that instant case. The defense objected on Fifth Amendment grounds, but the trial court ruled, and this Court held, that by putting forward mental state evidence as to certain reports through Elam, the prosecution was entitled to explore the mental state evidence in other (Dr. Lang's) reports. (*Buchanan*, supra, 483 U.S. at 408-412, 421-424.)

When *Buchanan* is viewed in its factual context, one can readily see that regardless of whether the defendant's evidence of mental state specifically relates to a theory of mental disease or defect, voluntary intoxication, or some other theory of mental shortcoming vitiating defendant's ability to form a criminal intent, the prosecution is entitled under the Fifth Amendment to put on rebuttal evidence derived from a compelled mental state examination of the defendant. Certainly under Kentucky law, the extreme emotional disturbance could have been related to either mental disease or intoxication. Likewise, the report the defense initially put forth related to a mental exam of Buchanan derived from an earlier arrest for a burglary, and the material the prosecution was allowed to use in rebuttal was derived from a later examination by a different examiner for the murder that was the subject of the prosecution at hand. Further, the reports were entered through the testimony of a social worker who had been assigned to the defendant's case.

To rule that the Fifth Amendment waiver is controlled based on a state law procedural classification (as the Kansas Supreme Court did here), would lead to nonsensical, incongruous results. In the case at bar, the Kansas Supreme Court held that defendant/respondent had not waived his Fifth Amendment right against self-incrimination, because he had not given notice under Kansas law that he would present evidence of mental disease or defect, and in his defense, he presented evidence as to his mental state related only to intoxication, not mental disease or defect. See Kansas Statutes Annotated 22-3219, 22-3220; *State v. Cheever*, supra, 259 Kan. at 248-251. The linchpin for the Kansas court's analysis is the Kansas statute, which defines when a defendant must give notice of mental state evidence, the type of mental state evidence covered by that notice requirement, and the type of examination that may be ordered in response.

Not all jurisdictions follow the Kansas rules, however. For instance, under California law, the court may order the defendant to submit to examination by "a prosecution-retained mental health expert" "whenever a defendant . . . places in issue his or her mental state at any phase of the criminal action. . . ." California Penal Code § 1054.3(b). Similarly, the Federal Rules of Criminal Procedure provide that a defendant must give notice if he intends to "introduce expert evidence relating to a mental disease or defect *or any other mental condition*" [emphasis added] bearing on guilt (or punishment in a capital case), and the court

may then order an examination of the defendant, although "No statement made by a defendant in the course of any examination made under this rule . . . [and] no testimony by the expert based on the statement [of the defendant] . . . may be admitted into evidence against the defendant . . . except on an issue regarding mental condition on which the defendant has introduced evidence" of which he was required to give notice. Federal Rule of Criminal Procedure 12.2. The California statute and the federal rule apply to a broader class of cases than K.S.A. 22-3219 – they include "mental state," or "any other mental condition," not just "mental disease or defect."

Applying the reasoning of the Kansas Supreme Court, a defendant who presents evidence of intoxication affecting the formation of mens rea in a California or federal proceeding would be deemed to have waived his Fifth Amendment rights, and subject to a compelled mental exam and rebuttal evidence from such, because the rules in those jurisdictions embracing "any mental condition" or "mental state" are broad enough to encompass intoxication. Certainly, such a result is well within the reasoning and application of the principles this Court enunciated in *Buchanan*. But the same defendant in Kansas, presenting the same evidence, would (according to the Kansas court) not have waived his Fifth Amendment right, because the Kansas statute only covers "mental disease or defect." It would be an odd inversion of our hierarchy of laws if a state law classification worked

a change, from state to state, as to the application of a federal constitutional right.[5]

The Kansas Supreme Court was not just splitting hairs when it differentiated between a "mental disease or defect" and voluntary intoxication and/or neurotoxicity so serious as to impede the actor's ability to form a criminal intent. It was invoking the Fifth Amendment to erect a limit on evidence that the Fifth Amendment simply does not impose.

III. THE EXAMINATION OF RESPONDENT BY THE PROSECUTION MENTAL STATE EXPERT, BEING FORENSICALLY COMPARABLE TO THE EXAMINATION CONDUCTED BY THE DEFENSE EXPERT, WAS PROPERLY WITHIN THE RANGE OF THE WAIVER AS TO MENTAL STATE EVIDENCE THAT RESPONDENT MADE WHEN HE PRESENTED THE EVIDENCE OF DR. EVANS

The Fifth Amendment privilege against self-incrimination comes into play here because the prosecution expert Dr. Welner gave testimony based in part upon his examination of respondent, which included an interview, conducted by court order. (J.A. 88-90.) Had Dr. Welner simply rendered an expert opinion based on his observations of the defendant

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[5] Cf. *United States v. Scheffer*, 523 U.S. 303, at 311, fn. 7 (1998).

and a review of police reports, there would have been no discussion about the Fifth Amendment privilege. But what Dr. Welner did in terms of his examination and interview of respondent, and what the defense witness Dr. Evans did, were directly comparable. Thus, Dr. Welner's evidence fit within the scope of the waiver the defense made when it presented the testimony of Dr. Evans.

A forensic mental state examination includes what amounts to an oral interview of the subject. Meloy, "The Forensic Interview," *Clinical and Diagnostic Interviewing, 2d Ed.*, Robert J. Craig, Ph.D., Editor, Rowan & Littlefield Publishers, Inc., 2005, at p. 422; Goldstein and Bursztan, "Capital Litigation: Special Considerations," *Handbook of Forensic Assessment: Psychological and Psychiatric Perspectives*, Drogin et al., Editors, Wiley Publishing, 2011, at p. 156. That is what both Dr. Evans and Dr. Welner did here. (J.A. 35, 47, 114). For Fifth Amendment purposes, their interactions with respondent were identical: talking to him and then using their expertise to reach an opinion as to the defendant's mental processes when he shot and killed Sheriff Samuels, then shot at several other officers. (as to Dr. Evans, J.A. 35, 47-52, 57-58, 64; as to Dr. Welner J.A. 114, 134-141.)

Dr. Evans' testimony focused on the effects of methamphetamine on the body generally, and on respondent in the crime situation in particular. (J.A. 38-85.) According to Dr. Evans, that neurotoxicity, as well as defendant's acute intoxication due to recent

methamphetamine ingestion, impacted the defendant's ability to plan, make decisions and "look[ ] at consequences, abstract reasoning, judgment[.]" when he killed the sheriff. (J.A. 42, 49.)

The testimony of Dr. Welner, from the point of view of how it was forensically derived, and what it covered, was comparable to that of Dr. Evans. He had reviewed comparable material, and had interviewed the defendant. (J.A. 112-115.) Dr. Welner's opinion was not restricted to testimony about fixed mental disease or defect (on which the Kansas Supreme Court was fixated, due to its focus on Kansas statutes 22-3219 and 22-3220). It extended to whether the methamphetamine intoxication affected respondent's mental ability to form the mental states at the time of the murder, in direct rebuttal to the testimony of Dr. Evans. (J.A. 124-141.) Dr. Welner opined that methamphetamine intoxication did not lead to respondent's violence; that it did not impair his perceptions, his decision-making abilities, or his ability to control his actions. (J.A. 136-141.)

Certainly, Dr. Evans and Dr. Welner had different qualifications. Dr. Evans was a Ph.D. in pharmacy, with a psychiatric pharmacy specialist. (J.A. 32-33.) Dr. Welner was an M.D. and psychiatrist, with board certifications in psychiatry, forensic psychiatry, and disaster medicine, and a background that included work on cases involving methamphetamine. (J.A. 95-99, 109.) Both experts held major academic positions, and both had extensive experience in forensic case work. It is not at all uncommon to see mental

experts from varying disciplines employed and providing evidence in criminal litigation – psychiatrists, psychologists, psychiatric social workers, and as in this case, psychiatric pharmacists. It certainly cannot be the case that the difference in academic credentials for these two experts is of any constitutional significance. While Dr. Welner's opinion on the role of methamphetamine in respondent's crime was at odds with Dr. Evans' opinion, both considered much of the same information, and interacted with respondent on a personal level in much the same way, in reaching their respective conclusions.

Because the forensic procedures and examinations of the two experts were entirely comparable, it follows within the symmetry of the Fifth Amendment waiver principles discussed above that it was within the scope of respondent's waiver to allow the rebuttal testimony of Dr. Welner. Dr. Evans' testimony, based in part on the voluntary interview respondent gave to him, was then voluntarily put before the jury when the defense called Dr. Evans to testify. That testimony interjected defendant's mental state into the case, and established a Fifth Amendment waiver as to the comparable evidence derived from the mental state compelled examination conducted by Dr. Welner. (See *Buchanan*, supra, 483 U.S. at 422-423.)

CONCLUSION

This Court has long recognized that a criminal defendant who submits to an examination and interview by his own mental state expert, and who then presents the testimony of that expert at trial, has waived the privilege against self-incrimination to the extent that the prosecution is allowed a comparable examination and interview by its own mental state expert, and the right to present testimony of that prosecution expert in rebuttal. Other courts have accepted and applied these principles. In the case at bar, the Kansas Supreme Court failed to properly apply these principles when it became fixated on principles of Kansas state procedural law. The unusual procedural posture of this case gave rise to a court ordered psychiatric examination that might not have been required or permitted under Kansas law. But the Kansas procedural rules do not govern the operation of the Fifth Amendment. The evidence presented in this case in no way violated Scott Cheever's Fifth Amendment privilege against self-incrimination. The Kansas Supreme Court, in ruling for respondent, erroneously gave Kansas procedural law constitutional standing. Your amici respectfully urges this Court to reverse.

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Respectfully submitted,

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